

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 JOHN KARPINSKI, CLARK COUNTY NATURAL  
3 RESOURCES COUNCIL and FUTUREWISE,

Case No. 07-2-0027

4  
5 Petitioners,

6 v.

**COMPLIANCE ORDER**

7  
8 CLARK COUNTY,

9 Respondent.

10  
11 And

12 GM Camas L.L.C., Johnston Dairy, et al and  
13 MacDonald Properties, Daryl Germann, Curt  
14 Gustafson, T3G, LLC and Hinton Development  
15 Corporation, Building Industry Association of Clark  
16 County and City of LaCenter,

17 Intervenors.  
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19  
20 This matter came before the board on October 20, 2009, pursuant to the Board's earlier  
21 Order Finding Continuing Noncompliance and Invalidity.<sup>1</sup> Nina Carter, James McNamara,  
22 and William Roehl participated on behalf of the Board with Mr. Roehl presiding. Christine  
23 Cook represented Clark County (the County). Robert Beattey represented the Petitioners.  
24 Brian K. Gerst represented McDonald Properties and GM Camas, LLC. James D. Howsley  
25 represented Johnston Dairy, et al. Daniel H. Kearns represented the City of La Center.  
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32 <sup>1</sup> Order Finding Continuing Noncompliance and Invalidity, January 8, 2009. This Order set a compliance hearing date of September 2, 2009. However, due to the illness of one of the parties' attorneys, the compliance hearing was rescheduled to October 20, 2009.

1 **I. RELEVANT PROCEDURAL HISTORY**

2 This case originally arose from the County's adoption of Ordinance 2007-09-13 which,  
3 among other things, de-designated various areas of agricultural lands of long-term  
4 commercial significance and added those lands to Clark County cities' Urban Growth Areas  
5 (UGAs). The Board issued an Amended Final Decision and Order (AFDO) on June 3, 2008,  
6 which found, *inter alia*, that the de-designation of numerous areas throughout the County  
7 did not comply with provisions of the Growth Management Act.<sup>2</sup> The Board's decision was  
8 appealed to the Clark County Superior Court.<sup>3</sup>

10  
11 Prior to the expiration of the compliance period established by the Board's January 2009  
12 Order, the Clark County Superior Court issued its decision.<sup>4</sup> The Court reversed the Board  
13 in part,<sup>5</sup> upheld the Board in part,<sup>6</sup> and found one of the de-designation decisions was  
14 moot.<sup>7</sup> The Superior Court's ruling was subsequently appealed and cross appealed to the  
15 Court of Appeals, Division II.<sup>8</sup>

17 **II. BURDEN OF PROOF**

18 For purposes of Board review of the comprehensive plans and development regulations  
19 adopted by local government, the GMA establishes three major precepts: a presumption of  
20 validity; a "clearly erroneous" standard of review; and a requirement of deference to the  
21 decisions of local government.  
22

23  
24 <sup>2</sup> RCW 36.70A.170 and RCW 36.70A.020(8).

25 <sup>3</sup> Clark County Superior Court Consolidated Cause No. 08-2-03625-5. No party having sought a stay during  
26 this court appeal, on January 8, 2009, the Board issued an Order Finding Continuing Non-Compliance and  
27 Invalidation based on the fact that Clark County had taken no action to achieve compliance.

28 <sup>4</sup> Clark County Superior Court Memorandum of Decision, May 20, 2009; Clark County Superior Court Order,  
29 June 12, 2009.

30 <sup>5</sup> The Board was reversed with respect to the following areas: CA-1, CB, LB-1, LB-2, LE, VA, VA-2, and WB.

31 <sup>6</sup> Areas BC and VB.

32 <sup>6</sup>Area RB-2. The Court's Order of June 12, 2009 stated "Area RB-2 is moot and remanded to the Board for  
proceedings consistent with this decision." It is the Board's understanding that the Court's decision regarding  
RB-2 was based on the belief that the City of Ridgefield had annexed RB-2 in its entirety. The County's  
compliance report indicates that only a portion of RB-2 was annexed and thus the area remaining under the  
County's jurisdictional authority remains before the Board for consideration.

<sup>8</sup> Court of Appeals Division II. Docket No. 39546-1.

1 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and  
2 amendments to them are presumed valid upon adoption:

3       Except as provided in subsection (5) of this section, comprehensive plans and  
4       development regulations, and amendments thereto, adopted under this chapter  
5       are presumed valid upon adoption.

6  
7 This same presumption of validity applies when a local jurisdiction takes legislative action in  
8 response to a noncompliance finding; that legislative action is presumed valid. The only  
9 time that the burden of proof shifts to the County is when the County is subject to a  
10 determination of invalidity.<sup>9</sup> The Board imposed invalidity in this matter.<sup>10</sup>

11  
12 Therefore, the County has the burden to demonstrate that the action it has taken in  
13 response to the Board's Amended Final Decision and Order of June 3, 2008 no longer  
14 substantially interferes with the goals of the GMA.

15  
16 Additionally, on legislative actions taken by a local jurisdiction in response to a finding of  
17 noncompliance, the statute further provides that the standard of review shall be whether the  
18 challenged enactments are clearly erroneous:<sup>11</sup>

19       The board shall find compliance unless it determines that the action by the state  
20       agency, county, or city is clearly erroneous in view of the entire record before the  
21       board and in light of the goals and requirements of this chapter.

22  
23 In order to find the County's action clearly erroneous, the Board must be "left with the firm  
24 and definite conviction that a mistake has been made."<sup>12</sup>

25  
26 Within the framework of state goals and requirements, the boards must grant deference to  
27 local governments in how they plan for growth:<sup>13</sup>

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30 <sup>9</sup> RCW 36.70A.320(2) and (4).

<sup>10</sup> AFDO, at 72.

<sup>11</sup> RCW 36.70A.320(3).

<sup>12</sup> *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

<sup>13</sup> RCW 36.70A.3201 (in part).

1 In recognition of the broad range of discretion that may be exercised by counties and  
2 cities in how they plan for growth, consistent with the requirements and goals of this  
3 chapter, the legislature intends for the boards to grant deference to the counties and  
4 cities in how they plan for growth, consistent with the requirements and goals of this  
5 chapter. Local comprehensive plans and development regulations require counties  
6 and cities to balance priorities and options for action in full consideration of local  
7 circumstances. The legislature finds that while this chapter requires local planning  
8 to take place within a framework of state goals and requirements, the ultimate  
burden and responsibility for planning, harmonizing the planning goals of this  
chapter, and implementing a county's or city's future rests with that community.

### 9 10 **III. ISSUE TO BE DISCUSSED**

11 Although the Board's June 2008 AFDO found Clark County had failed to comply with the  
12 GMA in regards to 11 areas, the appeals currently pending before the court continue the  
13 debate over many of these areas, specifically LB-1, LB-2, LE, VA, VA-2, and WB. Because  
14 of the court appeal, the Board issued an Order Granting Limited Stay of Compliance  
15 Proceedings in regards to these six areas.<sup>14</sup> However, the other areas – BC, CA-1, CB, RB-  
16 2, and VB – remain before the Board and will be addressed in this Order.

17  
18 The current compliance proceeding addresses the following two issues:

- 19 1. Whether Clark County has taken effective action in regards to areas BC, VB and the  
20 portion of RB-2 not annexed by the City of Ridgefield to bring itself into compliance and,  
21 if not, should the Board's prior determination of invalidity be continued?
- 22 2. What is the impact of the annexation of a portion of Area CA-1, Area CB, and the portion  
23 of Area RB-2 annexed by the City of Ridgefield in regards to Clark County's duty to  
24 achieve compliance with the GMA as set forth in the Board's AFDO?  
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### 27 **IV. DISCUSSION AND ANALYSIS**

#### 28 **Compliance-Areas BC, VB, and RB-2**

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<sup>14</sup> August 6, 2009, Order Granting Limited Stay of Proceedings.

1 The areas clearly before the Board for consideration in these compliance proceedings are  
2 BC, VB, and the portion of RB-2 which was not annexed City of Ridgefield. The County's  
3 Compliance Report failed to indicate any actions taken to bring these areas into compliance.  
4 During the compliance hearing, the County stated the court appeal regarding these three  
5 areas has been dismissed by a Court of Appeals order entered on September 25, 2009.  
6 Furthermore, the County stated that it is in the process of providing notification of intent to  
7 consider re-designation of those areas as agriculture lands of long-term commercial  
8 significance. The County's anticipated timeline will culminate with action by the Board of  
9 County Commissioners in mid-December 2009.  
10

11  
12 The Petitioners requested an order be entered finding the County remains in continuing  
13 noncompliance in regards these three areas.  
14

15 In that the County has yet to complete any compliance action, the Board's sole and  
16 appropriate option is to find the County in continuing noncompliance.  
17

18 **Conclusion:** As to Areas BC, VB, and the portion of RB-2 which was not annexed by the  
19 City of Ridgefield, the County continues to be out of compliance with RCW 36.70A.170.  
20 Furthermore, the de-designation of those areas continues to substantially interfere with  
21 RCW 36.70A.020(2) and (8), thus warranting continuation of invalidity.  
22

### 23 **Compliance- Areas CA-1, CB, and RB-2**

24 More troubling to the Board are three areas previously found to be non-compliant and  
25 invalid – CA-1, CB, and RB-2. The County requests the Board issue an order finding  
26 compliance and removing invalidity with respect to these areas because all three have been  
27 annexed and the related appeal is moot.<sup>15</sup> In addition, the County notes the Clark County  
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<sup>15</sup> Clark County's Compliance Report, at 3-4  
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1 Superior Court reversed the Board's decision as to CB and as to the property owned by GM  
2 Camas, LLC,<sup>16</sup> which the County states constitutes Area CA-1.<sup>17</sup>

3  
4 The history of the lands under appeal, the annexation in relationship to this appeal, and the  
5 Clark County Superior Court decisions are pertinent to the Board's resolution of this matter.

6  
7 City of Ridgefield: In the underlying case, Clark County dealt with two areas related to the  
8 City of Ridgefield – RB-1 and RB-2. Of these areas, the Board concluded that only the de-  
9 designation of agricultural lands of long-term commercial significance found in RB-2 to be in  
10 violation of the GMA.<sup>18</sup> On January 4, 2008, prior to the issuance of the AFDO<sup>19</sup>,  
11 Ridgefield received a Notice of Intention to Annex lands within RB-2.<sup>20</sup> On April 10, 2008,  
12 just nine days after the Hearing on the Merits, the City approved the annexation.<sup>21</sup>

13  
14 RB-2 encompassed 11 parcels for a total of 199.69 acres and was located along NW  
15 Hillhurst Road in the vicinity of land destined to be a new high school.<sup>22</sup> The annexation  
16 approved by Ridgefield Ordinance No. 991 related to five of these parcels, those for which  
17 Intervenor Pacific Lifestyle Homes had an interest.<sup>23</sup> The County concedes the fact that  
18 not all land was annexed. Its Compliance Report states: “[M]ost of Area RB-2 was  
19 annexed.”<sup>24</sup> Since not all of the land encompassed by RB-2 was annexed<sup>25</sup>, the appeal is  
20 not moot, as Clark County insinuates. Thus, the conclusions set forth in the Board's AFDO  
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26 <sup>16</sup> Clark County's Compliance Report, at 3.

27 <sup>17</sup> Clark County's Compliance Report, at 3.

28 <sup>18</sup> AFDO, at 52-53.

29 <sup>19</sup> Issued June 3, 2008.

30 <sup>20</sup> Clark County's Compliance Report, Exhibit 8 – Ridgefield Ordinance No. 991. It should be noted that the  
31 Petition for Review initiating this case was filed on November 16, 2007.

32 <sup>21</sup> Clark County's Compliance Report, Exhibit 8. The Board was not informed, either in briefing or at the HOM,  
of the pending annexation.

<sup>22</sup> Exhibit 605, Attachment A.

<sup>23</sup> Exhibit 8, Ridgefield Ordinance 991 – Exhibit 1; Intervenor's HOM Brief, Exhibit JL-2.

<sup>24</sup> Clark County's Compliance Report, at 3.

<sup>25</sup> Six parcels remain within the County's jurisdiction.

1 as to these unannexed parcels, along with the determination of invalidity, were and are  
2 effective.

3  
4 It should also be noted that the Clark County Superior Court did not rule on the merits of the  
5 Board's decision in regards to RB-2; rather the Court, apparently relying on a representation  
6 that the property subject to RB-2 had been annexed, found the appeal moot and remanded  
7 to the Board for proceedings consistent with the Court's decision.<sup>26</sup> As noted above, not all  
8 land was annexed and therefore the County was required to take legislative action on the  
9 portion of RB-2 which remains subject to the County's jurisdiction. The Superior Court's  
10 holding did not modify the Board's previously issued finding of non-compliance and  
11 determination of invalidity in this regard.  
12

13  
14 City of Camas: Two City of Camas areas were contested – CA-1 and CB – with the Board  
15 finding the de-designation of both of these areas failed to comply with the GMA.<sup>27</sup> CA-1,  
16 located near the northwest corner of Camas's UGA, was comprised of 34 parcels.<sup>28</sup> CB,  
17 located across Lacamas Lake from the UGA, contained 17 parcels. Property owners for  
18 some of these parcels did participate as intervenors in this appeal, namely GM Camas LLC  
19 (property interests within CA-1) and Johnston Dairy LLC (property interests within CB).  
20 Similar to Ridgefield, the City received a Notice of Intention for lands contained in CA-1 on  
21 December 14, 2007 and for CB on December 11, 2007, with annexation completed on April  
22 21, 2008.<sup>29</sup>  
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29 <sup>26</sup> June 12, 2009 Order; May 20, 2009 Memorandum of Decision.

30 <sup>27</sup> AFDO, at 79.

31 <sup>28</sup> The Board notes that the Superior Court Memorandum of Decision referred to Area CB-2. There was no  
32 such area and the Court Order later referred to Area CA-1. Based on the Court's descriptions of "Area CB-2",  
the Board concludes that it was in fact referencing Area CA-1 in the Memorandum of Decision.

<sup>29</sup> Clark County's Compliance Report, Exhibits 5 and 6, Camas Ordinances. As was the case with Ridgefield,  
the Board was not informed, either in briefing or at the HOM, of the pending annexation.

1 The 34 parcels of CA-1 totaled 342.46 acres yet the annexation approved with Ordinance  
2 No. 2512 encompassed substantially more - in excess of 550 acres.<sup>30</sup> The February 2009  
3 Stipulated Order explicitly limited the Court's holding, which reversed the Board, to the GM  
4 Camas property.<sup>31</sup> That is, the Court's Order did not encompass all of the lands within CA-  
5 1, a fact not clearly stated by the County in its Compliance Report.<sup>32</sup> Furthermore, the City  
6 did not annex all of the lands covered by CA-1, excluding those parcels along the eastern  
7 edge of the expanded UGA. That fact was not mentioned by the County. In fact, the County  
8 stated that "Area CA-1 . . . (was) annexed by the City of Camas".<sup>33</sup>  
9

10  
11 Area CB was fully annexed with the adoption of Ordinance No. 2511.<sup>34</sup> Clark County no  
12 longer has authority over this land as it is now contained within the municipal boundaries of  
13 the City of Camas. Although the Superior Court appeared to be confused as to CB's  
14 location and characteristics, the Court did reverse the Board.<sup>35</sup>  
15

16 **Conclusion:** The Board does not dispute that Camas and Ridgefield have annexed  
17 properties that were the subject of this appeal prior to the issuance of the Board's AFDO.  
18 Since invalidity can only apply prospectively,<sup>36</sup> the Board's ruling on invalidity had no effect  
19 on those annexed lands. Therefore, although the Board does not view rescission of  
20 invalidity as a necessity, the Board will expressly rescind its Determination of Invalidity as to  
21 those lands within CA-1, CB, and RB-2 which have been annexed to their respective  
22  
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25 <sup>30</sup> County's Compliance Report, Exhibit 5 – Ordinance 2512.

26 <sup>31</sup> ". . .the Western Washington Growth Management Hearings Board's Final Decision and Order is hereby  
27 reversed, with respect to GM Camas, LLC ." Stipulation and Agreed Order, February 6, 2009, pg. 2.

28 <sup>32</sup> "By a Stipulated and Agreed Order . . . Clark County Superior Court reversed the FDO with regard to the  
29 property owned by GM Camas, LLC, **which is Area CA-1.**" Clark County Compliance Report at 3.

30 <sup>33</sup> Clark County Compliance Report at 3.

31 <sup>34</sup> Clark County Compliance Report, Exhibit 6 – Ordinance 2511.

32 <sup>35</sup> The Superior Court incorrectly refers to this area as CB-2, a reference that did not exist in this matter. The  
Superior Court also notes that a substantial portion of this area is within a golf course. However, the golf  
course – owned by GM Camas LLC – is located within CA-1. May 20, 2009 Memorandum of Decision, at 4;  
June 12, 2009 Order.

<sup>36</sup> RCW 36.70A.302(2) A determination of invalidity is prospective in effect and does not extinguish rights that  
vested under state or local law before receipt of the Board's order.

1 municipalities. As a result of these annexations, the GMA's duty of planning for growth for  
2 the annexed areas, including the provision of public facilities and services, is now the sole  
3 responsibility of the respective cities.

4  
5 However, the issue presented to the Board with the PFR was whether the County's  
6 adoption of Ordinance 2007-09-13, which de-designated areas of previously designated  
7 agricultural lands of long-term commercial significance and adding that land to Clark County  
8 cities' UGAs, violated the GMA. The annexation of the land did not modify the underlying  
9 issue – it modified Clark County's ability to take legislative action in order to comply with the  
10 mandates of the GMA as determined by the Board in the AFDO. **The Superior Court's**  
11 **reversal of the Board's AFDO in regards to the GM Camas LLC property in CA-1, and**  
12 **in regards to CB, is acknowledged and the Board issues a Finding of Compliance.**

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14  
15 The Superior Court did not reverse the Board's conclusions as to RB-2; it remanded, finding  
16 the challenge regarding that area to be moot. However, as to the annexed lands in RB-2,  
17 since Clark County no longer has the authority to take legislative action to remedy its clearly  
18 erroneous de-designation of annexed lands, the Board has no alternative but to withdraw its  
19 order to achieve compliance.

20  
21 As to the parcels which remain within the County's authority in CA-1 and RB-2, the Board's  
22 conclusion as to non-compliance and invalidity remain. The County, as ordered by the  
23 Board's June 2008 AFDO and January 2009 Compliance Order, was to take legislative  
24 action to achieve compliance with the GMA. This the County has not done and, therefore,  
25 the Board finds continuing non-compliance and continuing invalidity as to the unannexed  
26 lands within CA-1 and RB-2.

1 **VI. ORDER**

2 The Board’s prior determinations of noncompliance and invalidity regarding the GM Camas  
3 LLC property in Area CA-1, Area CB, and the portion of Area RB-2 annexed by the City of  
4 Ridgefield are rescinded.

5  
6 Clark County must take legislative action to comply with the GMA in regards to Areas BC,  
7 VB and the portions of RB-2 and CA-1 which were not annexed by the cities of Ridgefield  
8 and Camas, respectively, in accordance with the Board’s prior orders within 120 days of this  
9 order according to the following schedule:  
10

Item	Date Due
<b>Compliance Due</b>	<b>February 25, 2010</b>
Statement of Actions Taken and Index to Compliance Record Deadline	March 11, 2010
Objections to a Finding of Compliance Deadline	April 1, 2010
Response to Objections Deadline	April 15, 2010
<b>Compliance Hearing</b>	April 27, 2010

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18 ENTERED this 29<sup>th</sup> day of October, 2009.  
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21 \_\_\_\_\_  
William Roehl, Board Member

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24 \_\_\_\_\_  
James McNamara, Board Member

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Nina Carter, Board Member  
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29  
30 Pursuant to RCW 36.70A.300 this is a final order of the Board.

31 **Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the**  
32 **mailing of this Order to file a petition for reconsideration. Petitions for**

1 reconsideration shall follow the format set out in WAC 242-02-832. The original and  
2 three copies of the petition for reconsideration, together with any argument in  
3 support thereof, should be filed by mailing, faxing or delivering the document directly  
4 to the Board, with a copy to all other parties of record and their representatives.  
5 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),  
6 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for  
7 filing a petition for judicial review. A response to a Motion for Reconsideration must  
8 be filed within 5 days of the filing of the motion.

9 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the  
10 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for  
11 judicial review may be instituted by filing a petition in superior court according to the  
12 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil  
13 Enforcement. The petition for judicial review of this Order shall be filed with the  
14 appropriate court and served on the Board, the Office of the Attorney General, and all  
15 parties within thirty days after service of the final order, as provided in RCW  
16 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,  
17 but service on the Board means actual receipt of the document at the Board office  
18 within thirty days after service of the final order.

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