BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

MICHAEL T. VINATIERI, EDWARD G. SMETHERS, and KAREN KNUTSEN, et al, Petitioners, v. LEWIS COUNTY, Respondent.	**No. 03-2-0020c** **FINAL DECISION AND ORDER**

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I. SUMMARY OF DECISION

In these consolidated petitions for review, we are asked to decide a number of challenges to Lewis County's legislative actions in response to prior board findings of non-compliance in three earlier cases. Because of the number of issues raised in the consolidated petitions for review, we provide a table of issues decided already, issues that are based on unchanged parts of the County's enactments, and issues decided in this case on pp. 7 – 14 below.

There are three major procedural issues decided in this case. We decide first that where the same issues are raised in a new petition for review as were determined in the compliance cases, the findings will be the same as in the corresponding compliance cases and the issues will be consolidated into the compliance cases. Second, we decide that where amendments have been made to respond to findings of non-compliance and do not exceed the scope of those findings, unchanged portions of the County's comprehensive plan and development regulations may not be challenged in the new petitions for review. Third, we decide that Petitioners may not challenge issues that were not otherwise timely raised on the grounds that the County failed to act during the remand period and therefore the earlier enactments expired. In this regard, we decide that the boards lack authority to enter findings that an ordinance or

resolution has expired; that the addition of the tool of invalidity evidences a legislative intent for the boards to retain jurisdiction over non-complying local ordinances rather than to cause them to expire automatically; and that, in this case, the County was granted extensions by the Board to complete its compliance efforts such that it did act within the remand period.

On the substantive issues decided in this opinion, we find that the Petitioners have failed to meet their burden of showing that the County was clearly erroneous with respect to the following:

- Resolution 03-202 at Section B.1, insofar as it amends Chapter 4, Land Use Element, pages 4-6 and 4-7 pertaining to Major Industrial Developments (requirement for a comprehensive plan amendment).

- Resolution 03-202 at Section B.3 adopting as part of the Comprehensive Plan Figure 16 B(1) Resource Lands Map to the extent of the changed portions of the map (elimination of the I-5/Highway 12 ILB and clarification of the location of the Centralia steam plant).

- LCC 17.102.050, as it has been amended, providing that accessory dwelling units (ADUs) must be either internal or attached to other structures in rural residential zones (consistency with Lewis County's comprehensive plan policies and development regulations regarding rural densities).

- Ordinance 1179B, Section 2 and LCC 17.115.030, LCC 17.10.076 and LCC 17.115.030 (regarding privately owned general aviation airports).

- LCC 17.30.560(1)(b) and LCC 17.30.590(3)(c) (landowner opt-in provisions for forest and agricultural resource lands of local significance).

- The County's public participation procedures (regarding cross-examination of experts and the behavior of one Planning Commission member).

- Whether notice of hearing for adoption of Resolution 03-068 and Ordinance 1179E contained sufficient detail to inform the public the County was considering Section B.4 of Resolution 03-368 and Section 2 of Ordinance 1179E to be codified in LCC 17.10.126.

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We find that the Petitioners did meet their burden of proof with respect to the following:

- Ordinance 1179B, Section 2 and LCC 17.20.015 fail to include a public participation process in adopting a master planned location for an industrial land bank and therefore fail to comply with the Growth Management Act.

We also incorporate by reference our findings of non-compliance and invalidity with respect to issues already decided in *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c, *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c, and *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c. These are listed in detail on the table below (III. Issues Presented in the Consolidated Petitions).

II. PROCEDURAL HISTORY

This case is a consolidation of three petitions for review filed in 2003, in response to actions taken by Lewis County to achieve compliance in *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c; *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c; and *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c. The petition originally denominated *Knutsen v. Lewis County* (former WWGMHB Case No. 03-2-0016) challenges Lewis County Resolution 03-202 and Ordinance No. 1179B. Resolution 03-202 and Ordinance No. 1179B were adopted on May 21, 2003 to achieve compliance with respect to the Compliance Order issued December 11, 2002 in *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c.

The petition originally denominated *Smethers v. Lewis County* (former WWGMHB Case No. 03-2-0018) challenges Lewis County Ordinance 1179C, adopted June 2, 2003. Ordinance 1179C addresses allowable uses in resource lands. The petition originally denominated *Vinatieri v. Lewis County* (former WWGMHB Case No. 03-2-0020) challenges Resolution 03-368 and Ordinance No. 1179E, which address the designation of agricultural lands of long-term commercial significance. Allowable uses in resource lands and designation of agricultural resources lands were compliance

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issues in *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c; and *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c; in both of which cases the latest compliance order (prior to the compliance hearing of January, 2004) was issued July 10, 2002.

The three new petitions for review filed in 2003 were consolidated on December 5, 2003 so that all could be heard together with the compliance cases. Order of Consolidation. A hearing on the compliance cases and the consolidated 2003 petitions for review was held in Lewis County on January 14 and 15, 2004. On February 11, 2004, the Board issued our Order Finding Noncompliance and Imposing Invalidity in *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c; and *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c. Subsequently, the following actions have occurred with respect to the *Butler* and *Panesko* cases:

- On February 20, 2004, Petitioner Panesko filed a Motion for Reconsideration.

- On February 23, 2004, the remaining petitioners (the "Butler Petitioners") filed a Motion to Correct, Amend or Reconsider.

- The County also requested clarification or reconsideration of the Board's Order Finding Noncompliance and Imposing Invalidity in Lewis County's Reply to Motion to Correct, Amend or Reconsider and Motion to Reconsider filed on March 4, 2004.

- The Board issued an Order on Motions for Reconsideration – 2004 on March 11, 2004. Among other matters addressed in the Order on Motions for Reconsideration - 2004, the Board agreed to reconsider the scope of the invalidity finding imposed upon the County zoning maps and set a date to hear argument.

- The reconsideration hearing date was extended on motion of the parties to April 26, 2004 to allow the parties to attempt to reach settlement on the scope of the maps to which the invalidity finding applies. Order Extending Date for Hearing on Reconsideration, April 5, 2004.

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- The Board also agreed to reconsider its Order Finding Noncompliance and Imposing Invalidity with respect to one of Petitioner Panesko's challenges. That issue was addressed in the Supplemental Compliance Order issued on March 29, 2004.

The Board issued the Order on Compliance Hearing – 2004, in *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c, on March 12, 2004.

III. ISSUES PRESENTED IN THE CONSOLIDATED PETITIONS

This Final Decision and Order thus follows upon compliance orders issued with respect to the same ordinances and resolutions challenged in this case. The County moved to dismiss issues raised in the *Smethers v. Lewis County*, WWGMHB Case No. 03-2-0018 petition on the grounds that it raises the same issues as would be resolved in the compliance cases, *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c; *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c; and *Yanisch v. Lewis County*, WWGHMB Case No. 02-2-0007c. Motion to Dismiss, October 8, 2003 (*Smethers v. Lewis County*, WWGMHB Case No. 03-2-0018). The Board denied the motion to dismiss on those grounds (Order Re: County's Motion to Dismiss, October 29, 2003) but granted the County's motion to dismiss Issues Nos. 1 and 2 of the *Smethers* petition because the challenged language was not amended in the new enactments and the issues were not subject to the Board's jurisdiction in the compliance cases since those issues had not been raised in the petitions on which the compliance cases were based. Order Granting County's Motion to Dismiss Issues Nos. 1 and 2, November 6, 2003 (*Smethers v. Lewis County*, WWGMHB Case No. 03-2-0018).

The County also moved to dismiss the Petition for Review in *Vinatieri v. Lewis County*, WWGMHB Case No. 03-2-0020, or, in the alternative, to defer the matters raised in *Vinatieri* until conclusion of the compliance proceedings. Motion to Strike, or, Alternatively, Defer All Matters Until the Conclusion of the Current Compliance

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Proceedings, November 25, 2003. At the Prehearing Conference held December 4, 2003, the parties agreed to have all the matters raised in the *Vinatieri* petition heard at the same time as the compliance proceedings. Prehearing Order, December 5, 2003 (*Vinatieri v. Lewis County*, WWGMHB Case No. 03-2-0020). The Board also granted all parties permission to incorporate by reference their arguments from one case into their briefs on the same issues raised in another case.

As the County reminds us, the Board's jurisdiction over the petitions for review (now consolidated as *Knutsen, Smethers and Vinatieri v. Lewis County*, WWGMHB Case No. 03-2-0020c) is limited to those issues that arise from amendments to the comprehensive plan or development regulations or to any new development regulations that were adopted in the ordinances and resolutions that were challenged in the petitions:

> A growth management hearings board shall hear and determine only those petitions alleging either:
> (a) That a state agency, county, or city planning under this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or
> (b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

RCW 36.70A.280(1)

> All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city.

RCW 36.70A.290(2)

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Thus, the issues for review in this consolidated case reach only the changes that the County has made in its comprehensive plan and development regulations; not necessarily all the issues that were before the Board on compliance are before the Board in these new petitions.

Further, many of the issues presented in the new petitions are the same as those on which the Board issued its Order Finding Noncompliance and Imposing Invalidity, February 13, 2004 (*Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c; and *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c). The issues raised in the consolidated petitions for review are listed below, according to the name of the petition in which each issue was raised. Although we do not agree with the County's argument that the Board has the authority to dismiss a petition on the grounds that it raises issues that are already being addressed in a compliance order, we do agree that the same result should apply to the same issues, regardless of the case name or number in which they arise. We also agree that it is unnecessarily burdensome for the parties to juggle several cases rather than to be able to address all the related issues in a single case.

On December 5, 2003, the Board consolidated all three new petitions into this case to meet the scheduling objectives of the parties:

> Except as provided in (b) of this subsection, the final order shall be issued within one hundred eighty days of receipt of the petition for review, *or, if multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated*.
>
> RCW 36.70A.300(2)(a)(emphasis added)

Since the parties had urged that all the outstanding compliance matters should be heard together, it was reasonable to consolidate all the new petitions challenging ordinances and resolutions adopted for compliance purposes into a single case. However, now that the *Butler* and *Panesko* compliance issues have been addressed in

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the Order Finding Noncompliance and Imposing Invalidity of February 11, 2004 (WWGMHB Case Nos. 99-2-0027c and 00-2-0031c) and the *Yanisch* compliance issues have been addressed in the Order on Compliance Hearing – 2004 (WWGMHB Case No. 02-2-0007c, March 12, 2004), we believe that it is appropriate to incorporate the Board's decision as to each of the issues decided in those cases that are also raised in the *Knutsen*, *Smethers* and *Vinatieri* petitions.

For ease of reference we have set out a table of issues below, indicating also whether the issue has already been decided in one of the compliance cases, whether the issue challenges an unchanged legislative enactment or whether the issue remains outstanding for resolution here. In the column of issues, "K" stands for an issue raised in the *Knutsen* petition for review; "S" stands for an issue raised in the *Smethers* petition for review; and "V" stands for an issue raised in the *Vinatieri* petition for review. The second column contains the name of the decision in which the issue has already been decided, if it has, or "Addressed Herein" if the issue was not decided in a prior order. Where the challenged language is unchanged from prior enactments, it is noted to be "Unchanged":

ISSUE	DECISION
K Issue No. 1: Does Resolution 03-202 at Section B.1, insofar as it amends Chapter 4, Land Use Element, pages 4-6 and 4-7 pertaining to Major Industrial Developments, fail to comply with RCW 36.70A.367(4) by failing to provide that approval of such developments must amend the Comprehensive Plan?	Addressed herein
K Issue No. 2: Does Resolution 03-202 at Section B.3 adopting as part of the Comprehensive Plan Figure 16 B(1) Resource Lands Map fail to designate the majority of agricultural resource lands and a significant portion of Forest Resource lands situated in Lewis County and thereby fail to comply with RCW 36.70A.060 and RCW 36.70A.170(1)(a) and (b)?	Addressed herein
K Issue No. 3: Does Resolution 03-202 at Section B.3 adopting as part of the Comprehensive Plan Figure 16 B(1) Resource Lands Map substantially interfere with the fulfillment of Goal No. 8 by failing to maintain and enhance a productive timber and agricultural industry and by failing to	Addressed herein

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encourage the conservation of productive forest lands and productive agricultural lands?	
K Issue No. 4: Does Ordinance 1179B, Section 2 and LCC 17.20.015 fail to comply with RCW 36.70A.367(4), RCW 36.70A.130(1) and RCW 36.70A.140 by failing to provide a public participation procedure and/or a procedure to amend the comprehensive plan in connection with the approval of an industrial land bank?	Addressed herein
K Issue No. 5: Does Ordinance 1179B, Section 2 and LCC 17.102.050 entitled "Implementation-accessory dwelling units" fail to comply with RCW 36.70A.110(1) by allowing residential densities greater than one Dwelling Unit per five acres and thereby allowing growth to occur that is urban in nature?	Compliant: *Yanisch* Order on Compliance Hearing - 2004, Issue No.1, March 12, 2004
K Issue No. 6: Does Ordinance 1179B, Section 2 and LCC 17.102.050 entitled "Implementation-accessory dwelling units" insofar as it permits residential densities greater than one dwelling unit per five acres fail to comply with RCW 36.70A.070, RCW 36.70A.130(1), and RCW 36.70A.040(5) requiring that the development regulations be "internally consistent" and that they be "consistent with the Comprehensive Plan"?	Addressed herein (reserved in *Yanisch* Order on Compliance Hearing – 2004, March 12, 2004.)
K Issue No. 7: Does Ordinance 1179B, Section 2 and LCC 17.115.030 fail to comply with RCW 36.70A.510 and RCW 36.70.547 by failing to comply with the consultation and filing requirements of RCW 36.70.547?	Based on unchanged section as discussed herein
K Issue No. 8: Does Ordinance 1179B, Section 2 and LCC 17.10.076 and LCC 17.115.030 fail to comply with RCW 36.70A.200 by failing to include privately owned local general aviation airports as essential public facilities?	Based on unchanged section as discussed herein
S Issue 1: Do LCC 17.30.420(1)(e) and .420(6) fail to comply with RCW 36.70.A.170(2) by failing to include Forest Land Grade 1 Areas in those areas to be designated as forest lands of long-term commercial significance?	Dismissed: *Smethers*, Order Granting County's Motion to Dismiss Issues Nos. 1 and 2
S Issue 2: Does the failure to include Forest Land Grade I areas substantially interfere with the fulfillment of Goal 8 of the GMA by failing to conserve productive forestlands?	Dismissed: *Smethers*, Order Granting County's Motion to Dismiss Issues Nos. 1 and 2
S Issue 3: Does LCC 17.30.470(1)(a) allowing disruption of 5% to 15% of the prime forest lands for nonforestry uses fail to comply with RCW 36.70A.060(1) by failing to assure conservation of forest lands and by failing to assure that the lands adjacent to such uses will not interfere with the continued use of the designated lands for the production of timber?	Unchanged

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S Issue 4: Does LCC 17.30.470(1)(a) allowing disruption of 5% to 15% of the prime forest lands for nonforestry uses substantially interfere with the fulfillment of Goal 8 by failing to maintain and enhance the natural resource, and by failing to conserve productive forestlands, and by failing to discourage incompatible uses?	Unchanged
S Issue 5: Does LCC 17.30.470(1)(a) allowing disruption of 5% to 15% of the prime forest lands and LCC 17.30.490(3)(d) allowing disruption of none of the prime soils fail to comply with RCW 36.70A.070 requiring an internally consistent document?	Unchanged
S Issue 6: Do LCC 17.30.470(2) and LCC 17.30.490(3) allowing residential subdivision as an incidental use on forest resource lands and LCC 17.30.640(2)(a) and LCC 17.30.660(1) allowing residential subdivision as an incidental use on agricultural resource lands fail to comply with RCW 36.70A.060(1) by failing to assure conservation of forest lands and agricultural lands and by failing to assure that the lands adjacent to such uses will not interfere with the continued use of the designated lands for the production of timber or food and agricultural products?	Non-compliant: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004
S Issue 7: Do LCC 17.30.470(2) and LCC 17.30.490(3) allowing residential subdivision as an incidental use on forest resource lands and LCC 17.30.640(2)(a) and LCC 17.30.660(1) allowing residential subdivision as an incidental use on agricultural resource lands fail to comply with RCW 36.780A.110(1) by permitting growth that is urban in nature to occur outside of urban areas?	Non-compliant to the extent found in: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004
S Issue 8: Does the allowance of residential subdivisions in forest resource lands and agricultural resource lands substantially interfere with Goal 8 of the GMA by failing to maintain and enhance the natural resource, and by failing to conserve productive forest lands and agricultural lands, and by failing to discourage incompatible uses?	Residential subdivisions not *per* se noncompliant: *Panesko*, Supplemental Order on Compliance, March 29, 2004; specific clustering and density provisions non-compliant and invalid: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004.

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S Issue 9: Does LCC 17.30.470(2)(d) allowing communication and public utility facilities fail to comply with RCW 36.70A.060(1) requiring a county to assure the use of lands will not interfere with the designated lands for production of timber?	Non-compliant: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004
S Issue 10: Do LCC 17.30.430(2)(c) and 17.30.560(1)(b), pertaining to forest land of local importance opt-in, and LCC 17.30.590(3)(c), and 17.30.700(1)(b), pertaining to farmland of local importance opt-in, fail to comply with the requirements of RCW 36.70A.060(1) to assure the conservation of agricultural, forest and mineral resource lands because each ordinance provision allows or mandates cessation of the designation or classification after a period of ten years?	LCC 17.30.560(1)(b) and 17.30.590(3)(c) are addressed herein; LCC 17.30.430(2)(c) and 17.30.590(3)(c) are not changed in ways relevant to the issue posed here.
S Issue 11: Does the failure to require the maintenance of the designation substantially interfere with the fulfillment of Goal 8 of the goals of the GMA for failure to maintain and enhance the industry or to conserve productive forest and agricultural lands or to discourage incompatible uses?	Addressed herein
S Issue 12: Do LCC 17.30.590(1)(b) and (c) under limitations imposed by LCC 17.30.580(1)(a) and (b) fail to comply with WAC 365-190-050 by removing from designation soils classified and identified as Prime Agricultural Soils under provisions of LCC 17.30.570 and do Sections LCC 17.30.590(1)(b) and (c) thereby fail to comply with RCW 36.70A.170(1)(a) requiring designation of agricultural resource lands and RCW 36.70A.060(1) requiring conservation of agricultural resource lands be assured?	See discussion of issue in *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004
S Issue 13: Does the failure to designate lands with long-term commercially significant productive soils substantially interfere with the fulfillment of Goal 8 of the Goals of the GMA for failure to maintain and enhance the industry or to conserve productive agricultural lands or to discourage incompatible uses?	Non-compliant and invalid: see *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004
S Issue 14: Does LCC 17.30.620(3), insofar as it may permit housing density in excess of one dwelling unit per 20 acres fail to comply with Policy NR 1.9 of the Lewis County Comprehensive Plan setting a maximum residential density of one dwelling unit per 20 acres and thereby fail to comply with RCW 36.70A.040(5) requiring development regulations to be consistent with the comprehensive plan?	Unchanged; see also *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004
S Issue 15: Do LCC 17.30.470(2)(c) and LCC 17.30.640(2)(b) permitting telecommunication facilities in designated forest or agricultural resource lands fail to comply	Non-compliant: *Butler/Panesko*, Order Finding

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with RCW 36.70A.060(1) requiring conservation of such resource lands and prohibiting uses that interfere with the continued use of the designated lands for the production of food, agricultural products, or timber?	Noncompliance and Imposing Invalidity,
S Issue 16: Do LCC 17.30.460(5) and LCC 17.30.640(2)(c) each allowing public and semi-public buildings and structures in designated timber and agricultural resource lands fail to comply with RCW 36.70A.060(12) requiring conservation of such resource lands and prohibiting uses that interfere with the continued use of the designated lands for the production of food, agricultural products, or timber?	LCC 17.30.640(2)(b) was held noncompliant: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004.
S Issue 17: Does LCC 17.30.640(2)(e) permitting home-based businesses authorized under LCC 17.42.040 permit non-resource-related businesses and thereby fail to comply with RCW 36.70A.060(1) prohibiting uses that interfere with the continued use of the designated lands for production of food and agricultural products?	Noncompliant: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004.
S Issue 18: Does the permission of home-based business on Agricultural Resource Lands substantially interfere with the fulfillment of Goal 8 of the GMA in that it fails to discourage incompatible uses?	Non-compliant and invalid: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004
S Issue 19: Do LCC 17.30.480 allowing essential public facilities in designated Forest Resource Lands, LCC 17.30.650 allowing essential public facilities in designated Agricultural Resource Lands, and LCC 17.30.780 allowing essential public facilities on designated mineral resource lands, each without county plan or development regulation land use review, fail to comply with RCW 36.70A.060(1) requiring that the county assure the conservation of designated forest, agricultural mineral resource lands and the county assure that the use of such adjacent lands will not interfere with continued use in the accustomed manner of such designated lands for the production of food, agricultural products, timber or extraction of minerals?	LCC 17.30.480, noncompliant and invalid; LCC 17.30.650, noncompliant and invalid; LCC 17.30.780 unchanged. *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004.

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S Issue 20: Does the allowance of essential public facilities on designated resource lands without county comprehensive plan or development regulation land use action substantially interfere with the fulfillment of Goal 8 of the GMA by failing to maintain and enhance the timber and agricultural industries, and by failing to conserve productive forest and agricultural lands, and by failing to discourage incompatible uses?	LCC 17.30.480, noncompliant and invalid; LCC 17.30.650, noncompliant and invalid; LCC 17.30.780 unchanged. *Butler/*Panesko, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004. See S Issue 19 above
S Issue 21: Did the Lewis County Planning Commission's denial of the right of citizens to question those witnesses specially invited by the Planning Commission to provide evidence for resource land protection and designations fail to comply with RCW 36.70A.140 requirements to provide for open discussion?	Addressed herein
S Issue 22: Did the act of a member of the Lewis County Planning Commission, at a meeting of the Planning Commission, publicly ridiculing a memorandum produced by citizens directly relating to requisites for compliance with the GMA fail to comply with the requirements of RCW 36.70A.140 calling for open discussion and consideration of and response to public comments?	Addressed herein
S Issue 23: Did the above two failures of compliance, 21 and 22, substantially interfere with the fulfillment of Goal 11 of the GMA by failing to encourage the involvement of citizens in the planning process?	Addressed herein
V Issue 1: Whether notice of hearing for adoption of Resolution 03-068 and Ordinance 1179E contained sufficient detail to inform the public the County was considering Section B.4 of Resolution 03-368 and Section 2 of Ordinance 1179E to be codified in LCC 17.10.126 and therefore lacked jurisdiction to consider the above sections and/or failed to comply with RCW 36.70A.035(2)(a)	Addressed herein
V Issue 2: Whether Section B 4 of Resolution 03-368 containing a determination that the long-term needs of Lewis County for long-term commercially significant agriculture is 40,000 acres fails to comply with RCW 36.70A.170(1)(a) requiring designation of agricultural lands that have a long-term significance for the commercial production of food or other agricultural products.	Noncompliant: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004

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V Issue 3: Whether Section 2 of Ordinance 1179E adopting Section 17.10.126(a) reciting a limitation of agricultural resource lands to those claimed to be necessary to support the current and future needs of the agricultural industry in Lewis County fails to comply with RCW 36.70A.030(2) by redefining agricultural land and RCW 36.70A.170(1)(a) requiring designation of agricultural lands that have a long-term significance for the commercial production of food or other agricultural products.	Noncompliant: *Butler/*Panesko, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004.
V Issue 4: Whether exclusion of land from designation that conforms to statutory and/or administrative code requirements for designation as Class A agricultural resource lands on the ground that such lands are in excess of the acreage the county claims is needed fails to comply with RCW 36.70A.170(1)(a).	Noncompliant: *Butler/*Panesko, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004
V Issue 5: Whether the provisions contained in the above three paragraphs fail to maintain and enhance the agricultural industry, fail to encourage conservation of agricultural lands and fail to discourage incompatible uses, thereby substantially interfering with the fulfillment of Goal 8 of RCW 36.70A.020.	Invalid: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004.
V Issue 6: Whether Section 2 of Ordinance 1179E adopting Section 17.10.126(b) excluding "farm homes" and "farm centers" from designated agricultural resource lands fails to comply with RCW 36.70A.170(1)(a) requiring designation of agricultural lands; RCW 36.70A.060 requiring conservation of agricultural lands and prohibiting interference with the continued use of such lands for production of agricultural products; and RCW 36.70A.040(5) requiring conservation of agricultural lands.	Noncompliant: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004.
V Issue 7: Whether exclusion from designation as agricultural resource lands of all agricultural zoning from the area west of I-5 between the City of Napavine and the City of Winlock fails to comply with criteria contained in WAC 365-190-050 and/or LCC 17.30.580 and thereby fails to comply with the minimum guidelines required under RCW 36.70A.050(1) and (3).	Noncompliant: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004
V Issue 8: Whether the systematic near exclusion from designation as Agricultural Resource Lands, lands that otherwise conform to requirements for designation of Class A agricultural resource land on the ground such lands do not have water rights fails to comply with RCW 36.70A.170(1)(a).	Noncompliant: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004.

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V Issue 9: Whether exclusion from designation as Agricultural Resource Lands of minor portions of lands in a single ownership primarily devoted to agriculture on the ground the minor portion is forested fails to comply with RCW 36.70A.170(1)(a).	Noncompliant: *Butler/Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004.
V Issue 10: Whether the provisions contained in the above four issues fail to maintain and enhance the agricultural industry, fail to encourage conservation of agricultural lands and fail to discourage incompatible uses and thereby substantially interfere with the fulfillment of Goal 8 of RCW 36.70A.020?	Invalid: Butler/*Panesko*, Order Finding Noncompliance and Imposing Invalidity, February 13, 2004.

Where the issue listed above has already been decided in an order in one of the compliance cases noted, then that issue will be consolidated into the compliance case in which the issue was decided. Issues 1, 4, 7 and 8 of the *Knutsen* petition and Issues 10 and 11 of the *Smethers* petition involve challenges to unchanged portions of the County comprehensive plan and development regulations. As noted above, the Board only has jurisdiction over those matters that are new adoptions or amendments to the comprehensive plan or development regulations. Unchanged portions of the comprehensive plan and development regulations may not be challenged in this case.

The only issues that will remain in this case (*Knutsen, Smethers and Vinitieri, et al. v. Lewis County*, WWGMHB Case No. 04-2-0020c) are K Issues 1,2, 3, 4, 6, 7 and 8; S Issues 10 (in part), 11, 21, 22, 23; and V Issue 1. These issues are renumbered below for purposes of this decision:

IV. REMAINING ISSUES PRESENTED

Issue No.1: Does Resolution 03-202 at Section B.1, insofar as it amends Chapter 4, Land Use Element, pages 4-6 and 4-7 pertaining to Major Industrial Developments, fail to comply with RCW 36.70A.367(4) by failing to provide that approval of such developments must amend the Comprehensive Plan?

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Issue No.2: Does Resolution 03-202 at Section B.3 adopting as part of the Comprehensive Plan Figure 16 B(1) Resource Lands Map fail to designate the majority of agricultural resource lands and a significant portion of Forest Resource lands situated in Lewis County and thereby fail to comply with RCW 36.70A.060 and RCW 36.70A.170(1)(a) and (b)?

Issue No. 3: Does Resolution 03-202 at Section B.3 adopting as part of the Comprehensive Plan Figure 16 B(1) Resource Lands Map substantially interfere with the fulfillment of Goal No. 8 by failing to maintain and enhance a productive timber and agricultural industry and by failing to encourage the conservation of productive forest lands and productive agricultural lands?

Issue No. 4: Does Ordinance 1179B, Section 2 and LCC 17.20.015 fail to comply with RCW 36.70A.367(4), RCW 36.70A.130(1) and RCW 36.70A.140 by failing to provide a public participation procedure and/or a procedure to amend the comprehensive plan in connection with the approval of an industrial land bank?

Issue No.5: Does Ordinance 1179B, Section 2 and LCC 17.102.050 entitled "Implementation-accessory dwelling units" insofar as it permits residential densities greater than one dwelling unit per five acres fail to comply with RCW 36.70A.070, RCW 36.70A.130(1), and RCW 36.70A.040(5) requiring that the development regulations be "internally consistent" and that they be "consistent with the Comprehensive Plan"?

Issue No. 6: Does Ordinance 1179B, Section 2 and LCC 17.115.030 fail to comply with RCW 36.70A.510 and RCW 36.70.547 by failing to comply with the consultation and filing requirements of RCW 36.70.547?

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Issue No. 7: Does Ordinance 1179B, Section 2 and LCC 17.10.076 and LCC 17.115.030 fail to comply with RCW 36.70A.200 by failing to include privately owned local general aviation airports as essential public facilities?

Issue No. 8: Do 17.30.560(1)(b), pertaining to forest land of local importance opt-in, and LCC 17.30.590(3)(c), pertaining to farmland of local importance opt-in, fail to comply with the requirements of RCW 36.70A.060(1) to assure the conservation of agricultural, forest and mineral resource lands because each ordinance provision allows or mandates cessation of the designation or classification after a period of ten years?

Issue No. 9: Does the failure to require the maintenance of the designation substantially interfere with the fulfillment of Goal 8 of the goals of the GMA for failure to maintain and enhance the industry or to conserve productive forest and agricultural lands or to discourage incompatible uses?

Issue No. 10: Did the Lewis County Planning Commission's denial of the right of citizens to question those witnesses specially invited by the Planning Commission to provide evidence for resource land protection and designations fail to comply with RCW 36.70A.140 requirements to provide for open discussion?

Issue No. 11: Did the act of a member of the Lewis County Planning Commission, at a meeting of the Planning Commission, publicly ridiculing a memorandum produced by citizens directly relating to requisites for compliance with the GMA fail to comply with the requirements of RCW 36.70A.140 calling for open discussion and consideration of and response to public comments?

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Issue No. 12: Did the above two failures of compliance, Issues No. 3 and 4, substantially interfere with the fulfillment of Goal 11 of the GMA by failing to encourage the involvement of citizens in the planning process?

Issue No. 13: Whether notice of hearing for adoption of Resolution 03-068 and Ordinance 1179E contained sufficient detail to inform the public the County was considering Section B.4 of Resolution 03-368 and Section 2 of Ordinance 1179E to be codified in LCC 17.10.126 and therefore lacked jurisdiction to consider the above sections and/or failed to comply with RCW 36.70A.035(2)(a).

V. BURDEN OF PROOF

Comprehensive plan amendments and development regulations, and amendments to them are presumed valid upon adoption. RCW 36.70A.320(1). The board "shall find compliance unless it determines that the action by the 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." RCW 36.70A.320(3). Petitioners bear the burden of showing that the County's actions were clearly erroneous.

In order to find the County's action clearly erroneous, the board must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993). Since these are new petitions, the prior findings of invalidity on related compliance matters do not affect the burden of proof in this case.

VI. DISCUSSION OF ISSUES

Although the issues are framed individually above, we will discuss them by the general topic under which they fall: first, the issues that pertain to unchanged portions of the County's comprehensive plan and development regulations to the extent the

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Petitioners argue that they are based on expired ordinances and/or resolutions; second, issues pertaining to industrial land banks; third, issues pertaining to maps; fourth, issues pertaining to airports; fifth, issues pertaining the consistency of the accessory dwelling unit provisions with the comprehensive plan; sixth, issues pertaining to opt-in provisions in resource lands; seventh, public participation challenges; and finally, the challenge to the sufficiency of the County's notice.

1) Applicability Of *Association Of Rural Resident v. Kitsap County* - Challenges To Unchanged Portions Of The County Code And Comprehensive Plan Based On Expiration Of Those Enactments

Positions of the Parties

Petitioners assert that the County may not amend the ordinances that were found out of compliance in prior board orders because those ordinances became ineffective by virtue of the County's failure to achieve compliance during the period of remand. Petitioners base their arguments upon the Supreme Court's holding in *Associated Rural Residents v. Kitsap County*, 141 Wn.2d 185, 4 P.3d 115 (2000):

> Under current law, a non-complying regulation remains in effect *during the period of remand*. RCW 36.70A. 300(4). This allows the non-complying IUGA to remain in effect while it is being amended. In the current situation, Kitsap County missed the deadline for compliance; therefore, Partners' application was submitted at a time the IUGA was no longer in effect because the period of remand had expired. Thus, the application had to vest to the pre-existing rural 2.5 zoning.
>
> *Rural Residents* at 192.

Petitioners argue that the County failed to adopt proper designations of agricultural resource lands as directed by this Board in its Final Decision and Order in *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c (June 30, 2000). Petitioners' Post Hearing Brief – Jurisdictional Issues, WWGMHB Case Nos. 03-2-0020c, 02-2-0007c, 00-2-0031c, and 99-2-0027c (February 6, 2004) at 3. February 13, 2004. They argue that this Board allowed the County 150 days from June 30, 2000 to achieve

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compliance with respect to this issue (designation of agricultural resource lands) but the County failed to act within the remand period. *Ibid* at 4. They also argue that the County failed to adopt development regulations to conserve resource lands within the time specified in prior orders so that those also expired. *Ibid* at 3. Further, they assert that the County failed to act to achieve compliance with respect to major industrial developments (*Ibid* at 8-11) and private general aviation airports so that these provisions of County code also expired. *Ibid* at 11-14.

These arguments go to the finding that many of the issues raised by Petitioners address unchanged and unamended portions of the comprehensive plan and county code. Petitioners urge that these provisions were not timely amended as directed by the Board and therefore have expired. Since the underlying provisions of the comprehensive plan and development regulations have expired, they argue, the County must adopt new ones.

The County responds that the boards have no authority to void a statute; the powers of the boards are limited to finding non-compliance or invalidity in response to petitions for review. Lewis County's Post Hearing Brief at 4. Further, the County argues that the statutory scheme of the GMA demonstrates the Legislature's intent to limit the effect of an invalidity or non-compliance finding to something less than voiding the non-compliant or invalid ordinance. *Ibid* at 6-9. Even invalid ordinances, the County urges, remain effective for certain purposes. RCW 36.70A.302(3)(b). The County urges that "an invalid ordinance by reason of lapse, then is treated the same as an invalid ordinance by reason of substantial interference – effectiveness is stayed by preventing vesting of certain projects – the ordinance does not become void." *Ibid* at 10.

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Board Discussion

Before turning to the specific facts in this case, we must acknowledge two fundamental principles that underlay the issue of the Board's authority. The first is that the boards are creatures of statute and have only those powers expressly conferred upon them by the statute. This principle is articulated in *Skagit Surveyors and Engineers v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962, 1998 Wash. LEXIS 473 (1998):

> Rather than confer broad powers to enforce the Growth Management Act and to remedy its violations, the Legislature was cautious in its grant of authority to the hearings boards. Thus, the jurisdiction of the boards is limited, RCW 36.70A.280, RCW 36.70A.290(2), and its remedial powers limited. See, e.g., RCW 36.70A.330(3) (boards may not impose sanctions but may only recommend they be imposed).

Ibid at 568.

> Whether it would be beneficial, useful or reasonable for a growth management hearings board to have the power to invalidate pre-Act ordinances is not at issue, only the statutory authorization of that power… Our role is to interpret the statute as enacted by the Legislature, after the Legislature's determination of what remedy best serves the public interest of this state; we will not rewrite the statute."

Ibid at 567.

We must be cognizant that if our supreme court will not find implied authority for the boards, it is hardly the business of the boards to give themselves authority that is not plainly present in the statute.

A second principle is also important to bear in mind. The growth management hearings boards determine whether state agencies, counties and cities (planning under the Act) are in compliance with state land use goals and requirements. The boards do not have authority to rule on individual permit applications (*Citizens for Mount Vernon v. City of Mount Vernon*,133 Wn. 2d 861, 947 P.2d 1208 (1997) and only

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affect the rights of individual citizens indirectly, and in the limited ways provided in RCW 36.70A.302. The Petitioners ask this Board to go beyond a determination of whether the County has acted in compliance with the GMA to a determination of what County law is. We are concerned that such a determination would go beyond determining compliance with the GMA and would therefore be a major expansion of the boards' role.

We begin with these fundamental principles because the first problem with the issue as posed to us by Petitioners' challenge is whether we have the authority to answer the question at all. Petitioners ask us to find that the County's ordinances expired as a result of the County's failure to act within the remand period established in prior orders. Setting aside for a moment the question of whether the County did act within the timeframes allowed by the Board, the Board has not been granted the statutory authority to determine that a local legislative enactment has expired. The boards' authority is set out in several parts of the GMA:

> The board shall issue a final order that shall be based *exclusively* on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, chapter 90.58 RW as it relates to adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW.

RCW 36.70A.300(1)(emphasis added)

In the final order, the board shall *either*:

> (a) *Find* that the state agency, county, or city is *in compliance* with the requirements of this chapter, chapter 90.58 RCW as it relates to adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW; or
>
> (b) *Find* that the state agency, county or city *is not in compliance* with the requirements of this chapter, chapter

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> 90.58 RW as it relates to adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW, in which case the board shall remand the matter to the affected state agency, county or city. The board shall specify a reasonable time not in excess of one hundred eighty days, or such longer period as determined by the board in cases of unusual scope or complexity, within which the state agency, county, or city shall comply with the requirements of this chapter. The board may require periodic reports to the board on the progress the jurisdiction is making towards compliance.

RCW 36.70A.300(3)(emphasis added)

> A board may *determine* that part or all of a comprehensive plan or development regulations are *invalid*…

RCW 36.70A.302(1)(in pertinent part)(emphasis added)

> If the board after a compliance hearing finds that the state agency, county, or city is not in compliance, *the* board *shall transmit its finding to the governor*. *The board may recommend* to the governor that the *sanctions* authorized by this chapter be imposed. The board shall take into consideration the county's or city's efforts to meet its compliance schedule in making the decision to recommend sanctions to the governor.

RCW 36.70A.330(3)(emphasis added)

The statute thus grants the board the following authority: to make decisions only on issues raised in timely petitions for review; to find whether the county or city is in compliance or not in compliance; to determine whether invalidity should be imposed; and to recommend sanctions to the governor in appropriate case. The statute does not expressly grant the boards the authority to determine that an ordinance has expired.

Petitioners seem to acknowledge that there is no such authority conferred expressly upon the boards but argue that the boards have implied authority to make the determination that an ordinance has expired:

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> If the ordinance cannot now be challenged as void we believe that can lead to an absurd result. Further, if the Hearings Board must pretend that that which is clearly void is not void, then its actions have become useless.

Petitioners' Response to County's Post Hearing Brief at 6.

The problem with Petitioners' argument is that a finding that an ordinance, policy or regulation has expired and is void requires significantly greater authority than even a finding of invalidity under the GMA. As the County points out, a finding of invalidity under the GMA does not prevent certain permit applications from vesting under RCW 36.70A.302(b) and so it is not equivalent to a determination that the underlying ordinance is void. Petitioners argue that the Board should have authority to make a determination that an ordinance has expired to avoid an absurd result: a developer could appeal to superior court many years after the board determination and get a ruling that the underlying ordinance was void, thus thwarting the GMA's policy of certainty in planning decisions. However, the fact that it would have been a better idea to give the boards authority to determine that an ordinance is void does not in and of itself give the boards that authority. See, for a related example, *Moore v. Whitman County*, 143 Wn.2d 96, 18 P.3d 566, 2001 Wash. LEXIS 140 (2000).

In addition, it is apparent that a finding that an ordinance is void may also be contradictory to the aims of the GMA. In this case, the Petitioners argue that the earlier enactments are now void so that they can compel the County to address them anew and open up issues that had not been timely challenged in the earlier proceedings. This, they believe, furthers the aims of the GMA. However, what are the other impacts of such a determination? If an ordinance is void for failure of the County to act timely, what is left? Does not such a finding void all the GMA-related efforts the County has made in the expired ordinance? If the County has to go back to the very outset of its efforts on the non-compliant issue, will that not also mean that County law will revert to its pre-GMA status? Assuming the effective policies and

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regulations are those that were in effect before the County began its efforts to comply with the GMA, the Board has no authority to declare those "pre-GMA" regulations void, invalid or non-compliant. *Skagit Surveyors and Engineers v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962, 1998 Wash. LEXIS 473 (1998). Once an ordinance has expired, how could the Board continue to maintain jurisdiction? Until such time as the Board could again assume jurisdiction to review them on the basis of yet another petition for review, would the County be acting wholly outside the scope of the GMA?

If Petitioners were to prevail on this point, it seems likely that the County would be left to start all over again, in the meantime operating under policies and regulations that did not even attempt to reach GMA requirements. Even if this were not the case, at a minimum the County would be left with the predicament of untangling which policies and regulations are applicable in place of the expired ordinance. Such a muddle would hardly be in the public interest. We conclude that a determination that a given plan or regulation is void would raise many more questions than it would answer.

We are also reluctant to declare an ordinance void for failure of the County to act within the period of remand because it is not clear that the holding of *Associated Rural Residents v. Kitsap County*, 141 Wn.2d 185, 4 P.3d 115 (2000), was intended to reach beyond the specific circumstances posed in that case. In *Associated Rural Residents*, the Supreme Court was dealing with an unusual situation. Reference to the Court of Appeals decision shows that Kitsap County had adopted an IUGA in 1993 but had not adopted any development regulations implementing it. *Association of Rural Residents v. Kitsap County*, 95 Wn. App.383, 393, 974 P.2d 863, 1999 Wash. App. LEXIS 545 (Div. I, 1999). The Central Growth Management Hearings Board had found the IUGA noncompliant but Kitsap County had not responded to the Board's order and, in

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fact, had missed the Board's deadline for compliance, when the application for a planned unit development was filed. The Court of Appeals and the Supreme Court both found that the planned unit development application vested to those rules in effect in 1994 when the application was filed. However, because the county had not adopted any development regulations implementing the IUGA, there were effectively no development rules applicable to the planned unit development permit except the general GMA provisions prohibiting urban growth outside an urban growth area. *Ibid* at 392. The Court of Appeals held that the GMA prohibition was sufficient to prevent the permit from issuing in the IUGA boundaries. *Ibid* at 396.

The Supreme Court, as Petitioners claim, found that the ordinance establishing the IUGA had expired because the county had failed to meet the deadline for compliance. *Association of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 192, 4 P.3d 115, 2000 Wash. LEXIS 473(2000). Therefore, the permit vested to the pre-GMA requirements that were in effect at the time that the application was filed in 1994. However, this decision should, we believe, be read in the context of its peculiar facts. The IUGA stood alone, without development regulations; it was non-compliant; and the county had failed to act to bring it into compliance. Clearly, a permit applicant would be at a loss to conform to non-existent development regulations and there was no statutory provision addressing the question of what regulations would be in effect.

This last point is critical. At the time that the growth hearings board originally found the IUGA non-compliant, the Legislature had not yet refined the effect of board decisions on the vesting of permit applications. However, the 1995 amendments expressly authorized the boards to address the question of vesting: the boards now have the authority to impose invalidity, and the legislation spells out the various consequences of a finding of invalidity. RCW 36.70A.302. With these new provisions, the Legislature has authorized the boards to essentially suspend the

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effectiveness of non-compliant planning policies and regulations for most purposes through a finding of invalidity (substantial interference with the fulfillment of the goals of the Act). RCW 36.70A.302(4).

A determination of invalidity is a separate tool available to the boards, additional to a finding of non-compliance. RCW 36.70A.302. A board determination of invalidity requires both a finding of non-compliance and a finding that the plan or regulation "substantially interferes with the fulfillment of the goals of this chapter." RCW 36.70A.302(1). A permit application filed during the period of invalidity does not vest to *current* local development regulations but will vest to those ordinances or resolutions that are ultimately found by the Board to no longer substantially interfere with the goals and requirements of the GMA. Even if the new ordinances or resolutions are still found to be non-compliant with the Act, permits vest to the new adoptions if they are determined to no longer be invalid::

> Except as otherwise provided in subsection (2) of this section and (b) of this subsection, a development permit application not vested under state or local law before receipt of the board's order by the county or city vests to the local ordinance or resolution that is determined by the board not to substantially interfere with the fulfillment of the goals of this chapter.

RCW 36.70A.302(3)(a).

Under the construction of the statute urged by Petitioners, a failure to meet the Board's timeline for compliance automatically voids the underlying ordinance. This would mean that a simple oversight could result in more serious consequences than anything the board could order intentionally. We do not believe that is the legislative intent. Rather, these amendments make it plain that the Legislature intends the boards to retain jurisdiction for purposes of achieving compliance, rather than simply voiding the non-compliant local legislation and forcing the local jurisdiction to start all over again. Now that the Legislature has addressed the boards' authority to affect pending development applications, the statutory scheme manifests the Legislature's intention

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that the non-compliant comprehensive plan provisions and development regulations remain in effect unless and until the Board determines them to be invalid. RCW 36.70A.300(4). The creation of the tool of "invalidity" demonstrates a legislative intent to compel compliance with state planning laws, something that continued board jurisdiction supports. Under the legislative scheme, the next rung up the enforcement ladder is sanctions by the governor – something done under carefully drawn circumstances and, again, aimed at compelling the local jurisdiction to achieve compliance. Voiding the local legislation would interfere with this structure and thwart the continuing work to achieve compliance that the GMA is intended to foster.

Finally, the County urges also that we find that the County did take action within the remand period ordered by this Board in all the relevant orders because this Board has granted or acquiesced in the County's need for more time to address all the issues now before the Board. We agree that this is not a case where the County simply refused to respond to the Board's orders. The County has undertaken a lengthy process and hired expert outside help to meet its obligations under the various orders of the Board. This has taken more time than originally anticipated but the County has kept the Board apprised of its efforts and the Board has allowed the County to take the time it needs to finish its process. We find, therefore, that the County has acted within the period of remand on all the orders at issue here.

Conclusion: In summary, we come to three conclusions. First, that the boards lack authority to declare that county and city ordinances and resolutions are void. Second, that the failure of a local jurisdiction to comply within the period of remand no longer makes the ordinance ineffective because a finding of invalidity is available to address the question of vesting of permits. Third, even if the failure of a local jurisdiction to comply within the period of remand does make the ordinance ineffective, in this case the County acted within the extended

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periods of remand granted by the Board. For the reasons stated above, we find that the issues that pertain to unchanged portions of the County's code and comprehensive plan did not expire and thus were not timely raised and cannot be challenged here.

2) Issues Pertaining to Industrial Land Banks

Issue No.1: Does Resolution 03-202 at Section B.1, insofar as it amends Chapter 4, Land Use Element, pages 4-6 and 4-7 pertaining to Major Industrial Developments, fail to comply with RCW 36.70A.367(4) by failing to provide that approval of such developments must amend the Comprehensive Plan?

Issue No. 4: Does Ordinance 1179B, Section 2 and LCC 17.20.015 fail to comply with RCW 36.70A.367(4), RCW 36.70A.130(1) and RCW 36.70A.140 by failing to provide a public participation procedure and/or a procedure to amend the comprehensive plan in connection with the approval of an industrial land bank?

Positions of the Parties

Petitioners argue that RCW 36.70A.367 requires a comprehensive plan amendment for the designation of a Major Industrial Development. Petitioners' Brief (*Knutsen)* at 2. The process for a Major Industrial Development designation, they argue, must be spelled out in the comprehensive plan. *Ibid*. The County responds that the challenged section incorporates the requirements of RCW 36.70A.367 by reference and is therefore compliant. Lewis County's Response Brief – *Knutsen* at 3.

Petitioners further argue that there are no provisions for notice and public participation because LCC 17.20.015 has not been amended to provide for general public notice and participation in the hearing examiner process that is the predicate for the comprehensive plan amendment.

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Board Discussion

The challenged comprehensive plan language is quoted in Petitioners' Brief at 1:

> Lewis County may designate up to two master planned locations for industrial activity that are not associated with the UGAs of the incorporated cities and towns for Major Industrial Developments, subject to the requirements of RCW 36.70A.367.

Ch. 4, pp. 4-6 and 4-7, "Major Industrial Developments".

We presume that the challenged resolution is compliant. RCW 36.70A.320. There are many criteria that must be met for establishing a master planned location for major industrial activity outside urban growth areas. RCW 36.70A.367. The County's comprehensive plan provides that it may designate up to two master planned locations "subject to the requirements of RCW 36.70A.367". One of the requirements of RCW 36.70A.367 is:

> Final approval of inclusion of a master planned location in the urban industrial land bank shall be considered an adopted amendment to the comprehensive plan adopted pursuant to RCW 36.70A.070, except that RCW 36.70A.130(2) does not apply so that inclusion or exclusion of master planned locations may be considered at any time.

RCW 36.70A.367(4)

Petitioners have failed to show how this provision, which incorporates the requirements of the statute by reference (including the requirement that the final approval of inclusion of a master planned location in the urban industrial land bank be considered an adopted amendment to the comprehensive plan), does not comply with the GMA.

Petitioners further argue that LCC 17.20.015 fails to comply with RCW 36.70A.367(4), RCW 36.70A.130(1) and RCW 36.70A.140 by failing to provide a public participation procedure and/or a procedure to amend. The County's argument is that the public participation procedure for comprehensive plan amendments still applies to major industrial development area adoptions, with the addition of the

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hearing examiner process prior to the comprehensive plan amendment. This is true because the industrial land bank must comply with RCW 36.70A.367, and be treated as a comprehensive plan amendment.

The County refers the Board to Ch. 17.12 to illustrate the ample provision it makes for public participation in the comprehensive plan amendment process. It is true that the County has a thorough and compliant public participation process for the planning decisions to which it applies. However, LCC 17.12.030 expressly excludes those long-range planning issues that involve a hearing examiner process from the public participation program:

> This chapter applies to long-range planning issues, including changes to the County comprehensive plan or development regulations, in proceedings *not involving a hearing examiner.*

LCC 17.12.030(emphasis added)

The problem is that the same provision of the statute that provides it shall be a comprehensive plan amendment also exempts final approval of inclusion of a master planned location in the industrial land bank from the normal public participation procedures of a comprehensive plan amendment. RCW 36.70A.367(4). Therefore, neither the county code nor the state statute adopted by reference into the county code makes provision for public participation in the process for adopting a location for major industrial activity. The statute makes it clear that adoptions of such master planned locations do not have to be limited to the annual comprehensive plan amendment cycle. RCW 36.70A.367. It does not suggest that this eliminates the need for public participation in the decision-making. The hearing examiner process used by the County provides a more particularized notice provision that gives neighboring property owners the opportunity to address impacts of the proposed development on them. However, this does not obviate the need for an opportunity for general public input. RCW 36.70A.035.

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The County argues that its public participation program (Ch.17.12 LCC) applies to adoptions of industrial land bank locations. County's Response Brief – *Knutsen* at 4. If this is the County's intention, then a simple revision to LCC 17.12.030 to clarify that it also applies to this process is all that is necessary.

Conclusion: Resolution 03-202 at Section B.1, insofar as it amends Chapter 4, Land Use Element, pages 4-6 and 4-7 pertaining to Major Industrial Developments is compliant with the Growth Management Act. However, Ordinance 1179B, Section 2 and LCC 17.20.015 fail to include a public participation process in adopting a master planned location for an industrial land bank and therefore fail to comply with the Growth Management Act.

3) Issues Pertaining to Maps

Issue No.2: Does Resolution 03-202 at Section B.3 adopting as part of the Comprehensive Plan Figure 16 B(1) Resource Lands Map fail to designate the majority of agricultural resource lands and a significant portion of Forest Resource lands situated in Lewis County and thereby fail to comply with RCW 36.70A.060 and RCW 36.70A.170(1)(a) and (b)?

Issue No. 3: Does Resolution 03-202 at Section B.3 adopting as part of the Comprehensive Plan Figure 16 B(1) Resource Lands Map substantially interfere with the fulfillment of Goal No. 8 by failing to maintain and enhance a productive timber and agricultural industry and by failing to encourage the conservation of productive forest lands and productive agricultural lands?

Positions of the Parties

Petitioners argue that the map was adopted without proper notice and without public participation. Petitioners' Hearing Brief (*Knutsen)* at 3. The County responds that it

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made no changes to resource lands in this map but only clarified the elimination of the I-5/Highway 12 ILB and corrected the Centralia steam plant location; since these are not the challenged changes, the County argues that the Board has no jurisdiction to review them. County's Response Brief – *Knutsen* at 3-4.

Board Discussion

The Petitioners do not challenge the maps to the extent that they make the changes to the I-5/Highway 12 ILB or the Centralia steam plant location. Instead, the Petitioners attempt to challenge the County's designation of forest and agricultural resource lands that are represented in these maps. We have held that the issue of designation of forest resource lands was not presented when those adoptions were made and thus cannot be challenged now. *Smethers v. Lewis County*, Order Granting County's Motion to Dismiss Issues Nos. 1 and 2, November 6, 2003. Further, where the County is merely re-adopting maps for the purpose of making some unrelated change, that re-adoption does not itself open the issue of unchanged designations for board review.

Conclusion: Resolution 03-202 at Section B.3 adopting as part of the Comprehensive Plan Figure 16 B(1) Resource Lands Map to the extent of the changed portions of the map (elimination of the I-5/Highway 12 ILB and clarification of the location of the Centralia steam plant) is compliant with the GMA. The issues of designation of forest resource lands and agricultural resource lands were not opened by this adoption.

4) Issue Pertaining to ADUs and Consistency with the Comprehensive Plan

Issue No.5: Does Ordinance 1179B, Section 2 and LCC 17.102.050 entitled "Implementation-accessory dwelling units" insofar as it permits residential densities greater than one dwelling unit per five acres fail to comply with RCW 36.70A.070, RCW 36.70A.130(1), and RCW 36.70A.040(5) requiring that the development

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regulations be "internally consistent" and that they be "consistent with the Comprehensive Plan"?

Positions of the Parties

Petitioners argue that an attached or internal accessory dwelling unit (ADU) should be considered a dwelling unit for the purpose of calculating the residential density in a zoning district, in order to make the county code consistent with the comprehensive plan. The County's comprehensive plan (Rural Area Policy 1.2) states: "Rural development should be encouraged to occur at a density of not more than one dwelling per 5 acres." LCC 17.102.050, on the other hand, allows for attached and internal ADUs in all Rural Development Districts (RDDs) and clustered areas, without considering them to be residential dwelling units. In addition, LCC 17.100.015 provides that the minimum dwelling density in RDDs can not be more than one dwelling unit per five acres. Petitioners argue that an accessory dwelling unit should be counted as a dwelling unit for the purposes of determining the underlying residential density in a rural zone. Therefore because LCC 17.102.050 allows for ADUs it is inconsistent with Rural Area Policy 1.2, in violation of RCW 36.70A.070, RCW 36.70A. 130(1), and RCW 36.70A.040(5) which require development regulations to be consistent with and implement comprehensive plans.

The County responds that the Board did not find LCC 17.102.050 noncompliant but accepted the County's use of ADUs in rural residential zones as long as the County made it clear in its code that such ADUs could not be detached or freestanding. The County states that it amended its ordinance to clarify that an ADU must be attached or within a new or existing primary single structure or associated building, and that it may not be a separate stand-alone structure.

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Board Discussion

In Yanisch v. Lewis County, Case No. 02-2-0007c (Order on Compliance Hearing – 2004, March 12, 2004) (*Yanisch)*, we affirmed that the only change required by the County to its code provisions regarding ADUs is to clarify that ADUs cannot be detached, stand-alone dwelling units.[1] We also referenced our decision in *Friends of San Juans, Lyn Bahrych and Joe Symons v. San Juan County*, WWGMHB Case No, 03-2-0003c (Corrected Final Decision and Order, April 17, 2003) (*Friends of San Juans*). In that case, this Board held that detached ADUs must be counted as dwelling units for the purpose of determining residential density. However, we found in the same case that internal or attached ADUs do not need to be counted as a unit of density because these types of ADUs do not increase density of structures on a parcel of property.

Ordinance 1179B amended LCC17.102.050 to clarify that ADUs are defined to be internal to single family structures or attached to a single family structure or already allowed accessory dwellings. This change makes it clear that ADUs are not stand-alone dwelling units. Consistent with our findings in *Friends of San Juans* and *Yanisch*, we find that ADUs in Lewis County as they are now defined should not be counted as a dwelling unit for the purpose of determining density. Therefore, they do not change the underlying density in rural zoning districts.

Petitioners refer us to LCC 17.10.075 for the County's definition of "dwelling unit":

> "Dwelling unit" means a building, or portion of a building or modular manufactured housing unit that is constructed or installed on a permanent foundation and designed for long-term human habitation, which has facilities for cooking, eating, sleeping, sewage, and bathing for use by one family (including resident domestic employees); the term does not

[1] See page 4 of that decision.

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> include tents, campers, recreational vehicles, or travel trailers. LCC 17.10.075

Petitioners Hearing Brief (*Knutsen)* at 6.

LCC 17.102.050 defines an accessory use that is allowed as a subordinate use of the primary dwelling unit: "To ensure that the accessory dwelling unit is clearly secondary to the primary dwelling unit, the floor area for the accessory dwelling unit shall in no case exceed 800 square feet, nor be less than 300 square feet, and the accessory dwelling unit shall contain no more than two bedrooms." LCC 17.102.050(1)(d). Creating an accessory use associated with a primary dwelling unit does not create an inconsistency between the language of the comprehensive plan addressing rural residential densities and the development regulation allowing such an accessory use; as we have said, the test of inconsistency is whether any feature of the comprehensive plan or development regulations precludes achievement of any other feature of the comprehensive plan or development regulations. *Carlson v. San Juan County*, WWGMHB Case No. 00-2-0016 (Final Decision and Order, September 15, 2000); *Better Brinnon Coalition v. Jefferson County*, WWGMHB Case No. 03-2-0007 (Amended Final Decision and Order, November 3, 2003). Nor does it create an inconsistency between the definition of dwelling unit and accessory dwelling unit. The accessory dwelling unit provisions describe an allowed use of the structures already permitted on the rural property. The County could have defined "accessory dwelling unit" in the definitions section of Chapter 17.10 LCC instead of in a separate chapter, as it did. However, that would change neither the content of the definition nor its overall meaning within the county code. It is possible to achieve the rural residential densities adopted by the County while still allowing accessory dwelling units since those accessory uses do not affect the allowed structural densities. We find no inconsistency.

Conclusion: Because LCC 17.102.050, as it has been amended, provides that ADUs must be either internal or attached to other structures in rural residential

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zones, it is consistent with Lewis County's comprehensive plan policies and development regulations regarding rural densities. We find that it now complies with RCW 36.70A.070, RCW 36.70A.130(1), and RCW 36.70A.040(5). Petitioners have not sustained their burden of proof and this issue is dismissed.

5) Issues Pertaining to Airports

Issue No. 6: Does Ordinance 1179B, Section 2 and LCC 17.115.030 fail to comply with RCW 36.70A.510 and RCW 36.70.547 by failing to comply with the consultation and filing requirements of RCW 36.70.547?

Issue No. 7: Does Ordinance 1179B, Section 2 and LCC 17.10.076 and LCC 17.115.030 fail to comply with RCW 36.70A.200 by failing to include privately owned local general aviation airports as essential public facilities?

Positions of the Parties

Petitioners argue that there must be evidence of compliance with the consultation and filing requirements of RCW 36.70.547 and no such evidence is in the record. Petitioners' Hearing Brief at 11-13. The County argues that Petitioners have unsuccessfully raised this issue in the past in *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c and are attempting to use the County's amendment to re-open it. County's Response Brief – *Knutsen* at 5-6.

Board Discussion

The County did not amend LCC 17.115.030 to add, change or delete any provisions dealing with notification and consultation with the State Department of Transportation or any provisions dealing with essential public facilities. The new sections address a hearing examiner process to ensure that the applicant has secured easements for

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runway safety (LCC 17.115.030(5)(a)(i)) and the date of the FAA regulations with which the applicant must comply (LCC 17.115.030(5)(a)(iii) and (6)(a)(iii)).

A new petition for review challenging the County's adoptions to address a board finding of non-compliance may not raise issues based on unchanged provisions of the new adoptions. That is because such a petition for review would be challenging provisions that were adopted more than 60 days since publication. RCW 36.70A.290(2). Here, the Petitioners are not challenging new language but the *failure to add* new language dealing with the issues they raise. However, the failure to add challenge still relates to the language that was adopted earlier[2] and therefore the failure to add language claim should have been raised at the same time. If this was done in *Yanisch* (it is not clear from the Petitioners' earlier briefing if they intended to reach these points), it did not result in a finding of non-compliance by this Board. Therefore, the issue of notification and consultation is not before this Board and must be dismissed.

Petitioners also claim that privately owned local general aviation airports should be defined as essential public facilities. However, these issues also arise from unchanged sections of the Lewis County Code (notably LCC 17.10.076) they are not before the Board on this new petition.

Conclusion: Petitioners have failed to timely raise the issues with respect to private general aviation airports and therefore Ordinance 1179B, Section 2 and LCC 17.115.030, LCC 17.10.076 and LCC 17.115.030 comply with the Growth Management Act.

[2] This holding is not applicable to those circumstances where the jurisdiction is undertaking a mandatory GMA activity such as an update pursuant to RCW 36.70A.130.

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6) Issues Pertaining to Opt-In Provisions for Resource Lands

Issue No. 8: Do LCC 17.30.560(1)(b), pertaining to forest lands of local importance opt-in, and LCC 17.30.590(3)(c), pertaining to farmlands of local importance opt-in, fail to comply with the requirements of RCW 36.70A.060(1) to assure the conservation of agricultural, forest and mineral resource lands because each ordinance provision allows or mandates cessation of the designation or classification after a period of ten years?

Issue No. 9: Does the failure to require the maintenance of the designation substantially interfere with the fulfillment of Goal 8 of the goals of the GMA for failure to maintain and enhance the industry or to conserve productive forest and agricultural lands or to discourage incompatible uses?

Positions of the Parties

Petitioners argue that the opt-in provisions for forest and agricultural resource lands of local importance fail to conserve resource lands because the use of the lands for resource purposes is temporary and does not require compatibility with adjoining property. Petitioners' Hearing Brief (*Smethers*) at 13-14. The County responds that the opt-in provisions apply to lands that do not otherwise meet the County's criteria for designation but may be needed for resource uses; by creating a resource designation, those lands may receive additional protections. County's Response Brief – *Smethers* at 16-17. The County notes that the ten-year period was chosen to prevent inappropriate short-term use at the same time as encouraging the designation when it would be beneficial to the farmer. *Ibid* at 16.

Board Discussion

The opt-in provisions are new sections of the county code, adopted as LCC 17.30.560(1)(b) (pertaining to forest land of local importance opt-in) and LCC

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17.30.590(3)(c) (pertaining to farmland of local importance opt-in). There is nothing in the terms of the code to suggest that these provisions are intended to supplant resource land designation and conservation. In fact, the County's brief states: "The opt-in provision does not detract from the minimum lands necessary for the conservation of agricultural resource lands under RCW 36.70A.060(1), since such activity is in addition to the minimum lands designated pursuant to the order in the *Butler* case." County's Response Brief – Smethers at 17. While this Board has found non-compliance and invalidity with respect to the County's agricultural resource land designations in the *Butler* case, these sections do not affect those designations; they simply allow additional lands to be designated at landowner option.

Conclusion: LCC 17.30.560(1)(b) and LCC 17.30.590(3)(c) comply with the Growth Management Act.

7) Issues Pertaining to Public Participation

Issue No. 10: Did the Lewis County Planning Commission's denial of the right of citizens to question those witnesses specially invited by the Planning Commission to provide evidence for resource land protection and designations fail to comply with RCW 36.70A.140 requirements to provide for open discussion?

Issue No. 11: Did the act of a member of the Lewis County Planning Commission, at a meeting of the Planning Commission, publicly ridiculing a memorandum produced by citizens directly relating to requisites for compliance with the GMA fail to comply with the requirements of RCW 36.70A.140 calling for open discussion and consideration of and response to public comments?

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Issue No. 12: Did the above two failures of compliance, Issues No. 10 and 11, substantially interfere with the fulfillment of Goal 11 of the GMA by failing to encourage the involvement of citizens in the planning process?

Positions of the Parties

Petitioners argue that the failure to permit cross-examination of witnesses called to provide expert information about issues before the Planning Commission (primarily in the context of the designation and protection of agricultural lands) constitutes a failure of "open discussion". Petitioners' Hearing Brief (*Smethers*) at 25. Petitioners refer to RCW 36.70A.140 which provides that the county's public participation plan shall provide for " provision for open discussion". RCW 36.70A.140. Petitioners cite the dictionary definition of "discussion" as "consideration of a question in open and usually informal debate." *Ibid* at 25. Petitioners further invoke due process to argue that since cross-examination is allowed in zoning proceedings (citing *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 480 P.2d 489(1971)), it should be allowed in proceedings before the Planning Commission in which witnesses are called. *Ibid*.

The County responds that cross-examination is allowed in zoning proceedings because those are quasi-judicial in nature. Lewis County's Response Brief – *Smethers*, at 25. Legislative proceedings are not subject to the same constraints. *Ibid*. The County further notes the lengthy public process that the County followed and the opportunities that the Petitioners had to participate.

Petitioners also point to the conduct of one of the Planning Commission members, as publicly ridiculing the input that Petitioners had provided about the requirements of the GMA. The County responds that the Planning Commission member was not ridiculing the Petitioners, but was merely expressing frustration. *Ibid* at 27.

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Board Discussion

We decline Petitioners' invitation to extend the meaning of public participation to include the right to cross-examine speakers, on whichever side of a proposition. The legislative process involves input from the public but it does not necessarily include the ability to confront or cross-examine all sources of input. If it did, then written submissions could not be accepted without an opportunity for those holding an opposing view to question those submitting written comments. Rather than promote public discussion, this would limit it to those who were willing and able to participate orally in scheduled meetings. It would also be extremely difficult to tell which "side" of an issue had the right to cross-examine, since the subject to be decided (planning policies and regulations) is not personal to anyone but instead involves the public interest generally.

We further note the danger of cross-examination in the context of public comment. Cross-examination is an unabashedly adversarial technique. A damper would be placed on public participation if any speaker could be cross-examined by someone holding an opposing view. As long as the opportunity exists for members of the public to provide additional or clarifying information, cross-examination is unnecessary and likely to lead to "more heat than light" in considering the relative merits of any position. *See State v. Smith*, 106 Wn.2d 772, 773, 725 P.2d 951, 1986 Wash. LEXIS (1986), citing *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950).

We have reviewed the videotape of the meeting in which a Planning Commission member is alleged to have ridiculed the input of Petitioners. Tape of May 6, 2003 Planning Commission Meeting. The Planning Commission member reviews the written submission of the Petitioners and states that he believes the Petitioners are "speaking with forked tongue". Then he begins what he calls "the sarcastic part" of his comments: The goal of the Petitioners, he says, is to stop the capitalist way of life.

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He goes on to say that they would like to make the county into a park and make themselves park rangers. The Petitioners are said to be promoting the reversion of all lands back to nature and horse-drawn vehicles.

The Planning Commission member clearly misread the written submissions of Petitioners, which are listed in Ex. XII-28h. He further expresses his opinion of their suggestions as acting chair of the Planning Commission on that date in a derogatory and, as he himself states, sarcastic manner. One of the Petitioners, Susan Roth, stated at the compliance hearing/hearing on the merits that there were some occasions when she did not speak up because she didn't want to put herself through the same treatment that she felt others had experienced.

The parameters of public participation under the GMA are to be set by each jurisdiction's public participation plan. RCW 36.70A.140. However, the parties appeared to agree at the hearing on several points regarding public participation as a general matter. First, that all forms of public participation, written and oral, should be encouraged. Second, that, although the private mental processes of individual decision-makers are not open for scrutiny, it would not be acceptable for a decision maker to announce his mind was made up before public input had been received. Third, that public participation should occur without the fear of retaliation or any form of intimidation.

Our review of the public participation in the record before us shows that there were many opportunities for comment, written or oral, and that the Petitioners took advantage of the opportunities to provide very thorough input. Therefore, we believe the first principle is met.

As to the second principle, we agree that the decision-makers should not announce that they have pre-judged their position on an issue. It appears clear that this would deter public comment since a reasonable person would assume his or her comments

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would not make any difference nor be welcome. In this case, the Planning Commission member made public his position on the information submitted by the Petitioners months before the Planning Commission actually made its recommendation. Petitioners reasonably felt a lack of respect for the work they had done (work that was truly impressive in this case) and an unwillingness on the part of that Planning Commission member to consider what they had to say. We cannot condone the actions of the Planning Commission member.

On the other hand, we have before us a lengthy public participation record that accorded the Petitioners many opportunities to participate. The thoroughness of the record presented on behalf of Petitioners' case is evidence of the success of that process. We are mindful that the issues of designation and conservation of resource lands in Lewis County are highly contentious and that feelings run very high, on all sides. The record demonstrates several occasions on which conflict between points of view was very tense. We must also acknowledge that cooler heads prevailed on the Planning Commission and, in the main, the Petitioners were given their due opportunity to provide input.

Planning commissions are constituted by statute to ensure citizens have a voice in putting together local government land use plans and development regulations. Typically, local legislative bodies delegate much of the task of gathering public input to planning commissions. Therefore, it is critical that the planning commission's public process is open and fair to all points of view. While planning commissioners are appointed by the legislative body, we realize that it is important that planning commissions give the legislative body independent advice. Nevertheless, the local legislative body has the responsibility to communicate to the planning commission that its conduct of the public process be fair and open. Local governments should instruct the planning commission about the legislative body's expectations on how the

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public process should be conducted or when a planning commission or when individual planning commissioner hinders proper functioning of the public process, the legislative body should provide input to the planning commission on the appropriateness of behavior that inhibits the public process.

We caution the County that this kind of behavior on the part of the Planning Commission member makes a close case on the adequacy of public participation procedures, but do not find a lack of compliance with RCW 36.70A.140 and the County's public participation plan, Ch.17.12 L.C.C., here.[3]

Conclusion: The County's public participation procedures complied with RCW 36.70A.140.

9) Notice Challenges

Issue No. 13: Whether notice of hearing for adoption of Resolution 03-068 and Ordinance 1179E contained sufficient detail to inform the public the County was considering Section B.4 of Resolution 03-368 and Section 2 of Ordinance 1179E to be codified in LCC 17.10.126 and therefore lacked jurisdiction to consider the above sections and/or failed to comply with RCW 36.70A.035(2)(a).

Positions of the Parties:

The Petitioners urge that the County failed to follow the statutory procedures for notice to enact Ordinance 1179E adopting definitions of agricultural lands or of farm home and farm center; to enact the Abplanalp rezone; and to adopt Resolution 3-368

[3] As to the third principle, the parties discussed a potential claim of retaliation at the compliance hearing/hearing on the merits. Several Petitioners who spoke up in favor of increasing the amount of agricultural lands that were designated as Class A Farmlands found that their own property was designated agricultural resource land as a result. This Board takes a very dim view of any official action against members of the public on the basis of their public comments. However, this issue was neither raised in the petitions for review nor briefed. In the absence of an issue presented to the Board on this point, the Board has no basis on which to make a determination. RCW 36.70A.290(1)

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pertaining to long-term needs of agriculture. Petitioners' Response to County's Post-Hearing Brief at 4. These enactments, Petitioners argue, are void. *Ibid*.

The County responds that this Board does not have jurisdiction to determine compliance with the Planning Enabling Act, Ch. 36.70 RCW and that this issue must be limited to RCW 36.70A.035. County's Response Brief – *Vinatieri.*

Board Discussion

The Board reached the merits of these challenges in the February 13, 2004 Order Finding Non-Compliance and Imposing Invalidity, *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c and *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c. We found at that time that the Petitioners had participated sufficiently to have standing to raise their challenges. We find also that they had sufficient notice to provide meaningful input to the proposals, input which they in fact did provide.[4]

At the compliance hearing/hearing on the merits held January 14 and 15, 2004, the County provided us with evidence that the proposed farm home and farm center changes had been provided at the public meeting in early August, 2003. The rezone of the Abplanalp property and the change to the comprehensive plan language were all addressed at public hearings by Petitioners. There was opportunity to speak to those issues at one subsequent Planning Commission hearing and at a hearing before the County Commissioners. While we stress that this notice was not ideal, under the specific facts of this case, we find it sufficient.

[4] We note that the fact that Petitioners attended the meetings does not alone make the notice "reasonable". *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c, (Final Decision and Order, March 5, 2001)

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Regarding the Board's authority to find the legislation void, we reference the discussion of Board authority *supra.*

Conclusion: As to this challenge, the County is in compliance with respect to notice provided.

VII. FINDINGS OF FACT

1. Lewis County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.70A.040.

2. This case is a consolidation of three petitions for review filed in 2003, raising issues relative to the adoption of resolutions and ordinances by Lewis County. The challenged resolutions and ordinances were adopted to address prior Board orders of non-compliance and invalidity. The three petitions were originally filed as *Knutsen v. Lewis County*, WWGMHB Case No. 03-2-0015; *Smethers v. Lewis County*, WWGMHB Case No. 03-2-0018; and *Vinatieri v. Lewis County*, WWGMHB Case No. 03-2-0020.

3. All of the named Petitioners in each of the petitions consolidated in this case participated orally and/or in writing before the Planning Commission and/or the Board of County Commissioners with respect to the issues raised in the petitions for review.

4. The following issues have already been decided by the Board in compliance proceedings in *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c, *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c, or *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c:

   a. *Knutsen* Issue No. 5 (found compliant in *Yanisch)*
   b. *Smethers* Issues Nos. 6, 7, 8, 9, 12, 13, 15, 16, 17, 18, 19, 20 (noncompliant in *Butler* and *Panesko*) [5]
   c. Vinatieri Issues Nos. 2, 3, 4, 5, 6, 7, 8, 9 and 10 (noncompliant in *Butler* and *Panesko).*

5. The Board incorporates by reference its findings with respect to these issues from the following decisions: Order Finding Non-Compliance and Imposing Invalidity, February 13, 2004 (*Butler* and *Panesko)*; Order on Compliance

[5] *Smethers* Issues 7, 8, 19 and 20 were found noncompliant only in part.

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Hearing – 2004, March 12, 2004 (*Yanisch)*; and Supplemental Compliance Order, March 29, 2004 (*Panesko* and *Butler)*.

6. The following issues challenge sections of the County's adoptions that were unchanged from prior County legislation. The issues were thus not timely challenged since they were not challenged within sixty days of the date of publication originally:

   a. *Knutsen* Issues 7 and 8
   b. *Smethers* Issues 3, 4, 5, 19 and 20 (Issues 19 and 20 in part)

7. The following issues were dismissed by Order Granting County's Motion to Dismiss Issues Nos. 1 and 2, November 6, 2003 (*Smethers*):

   Smethers Issues 1 and 2

8. The County has undertaken a lengthy process and hired expert outside help to meet its obligations under the various compliance orders of the Board. This has taken more time than originally anticipated by the Board but the County has kept the Board apprised of its efforts and the Board has allowed the County additional time to finish its compliance work. The County has acted to achieve compliance during the extended remand period.

9. Resolution 03-202 at Section B.1, insofar as it amends Chapter 4, Land Use Element, pages 4-6 and 4-7 pertaining to Major Industrial Developments incorporates the requirements of RCW 36.70A.367 by reference. This includes a requirement that the master planned location for a major industrial development be treated as a comprehensive plan amendment.

10. Neither the county code nor the state statute adopted by reference into the county code (RCW 36.70A.367) makes provision for public participation in the process for adopting a location for major industrial activity.

11. The Comprehensive Plan Figure 16 B(1) Resource Lands Map adopted by Resolution 03-202 at Section B.3 made no changes to resource lands but only clarified the eliminated the I-5/Highway 12 ILB and corrected the Centralia steam plant location.

12. The accessory dwelling unit provisions (Ordinance 1179B, Section 2 and LCC 17.102.050) describe an allowed use of the structures already permitted on the rural property. Creating an accessory use associated with a primary dwelling unit does not create an inconsistency between the language of the

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comprehensive plan addressing rural residential densities and the development regulation allowing such an accessory use because accessory dwelling units (as defined by the amended county code) do not affect structural densities.

13. The County did not amend LCC 17.115.030 to add, change or delete any provisions dealing with notification and consultation with the State Department of Transportation or any provisions dealing with essential public facilities. Even though the Petitioners challenge the failure of the County to include provisions that they allege should have been included, that challenge was ripe when the County first adopted the challenged sections, LCC 17.115.030 and LCC 17.10.076, and is not timely now.

14. The opt-in provisions of the county code, adopted as LCC 17.30.560(1)(b) (pertaining to forest land of local importance opt-in) and LCC 17.30.590(3)(c) (pertaining to farmland of local importance opt-in) apply to lands used for resource production that do not otherwise fit the criteria for protection and conservation. Provisions allowing landowners to opt-in to resource land protections for a ten-year period do not violate the Growth Management Act when they do not supplant proper resource land designation and conservation. This Board has found non-compliance and invalidity with respect to the County's agricultural resource land designations in the *Butler* case, but these sections do not affect those designations; they simply allow additional lands to be designated at landowner option.

15. The legislative process involves input from the public but it does not necessarily include the ability to confront or cross-examine all sources of input. In this case, there were many opportunities for comment, written or oral, and the Petitioners took advantage of the opportunities to provide very extensive input.

16. On May 6, 2003, the acting Planning Commission chair reviewed the written submission of the Petitioners and stated that he believed the Petitioners were "speaking with forked tongue". In what he called "the sarcastic part" of his comments he stated that the goal of the Petitioners is to stop the capitalist way of life. He went on to say that the Petitioners would like to make the county into a park and make themselves park rangers. He says that the Petitioners are promoting the reversion of all lands back to nature and horse-drawn vehicles.

17. By making public his position on the information submitted by the Petitioners months before the Planning Commission actually made its recommendation, the Planning Commission member expressed an unwillingness to consider what they had to say. Petitioners reasonably felt a lack of respect for the work

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they had done. Also, the Planning Commission member clearly misread the written submissions of Petitioners.

18. The issues of designation and conservation of resource lands in Lewis County are highly contentious and feelings run very high, on all sides. Despite some very tense moments, cooler heads prevailed on the Planning Commission and, in the main, the Petitioners were given their due opportunity to provide input.

19. Notice of the proposed farm home and farm center changes had been provided at the public meeting in early August, 2003. The rezone of the Abplanalp property and the change to the comprehensive plan language were all addressed by Petitioners at public hearings. There was opportunity to speak to those issues at one subsequent Planning Commission hearing and at a hearing before the County Commissioners. Given the circumstances of this case, where there was lengthy public participation and a fully developed record, the notice of hearing for adoption of Resolution 03-068 and Ordinance 1179E contained sufficient detail to inform the public the County was considering Section B.4 of Resolution 03-368 and Section 2 of Ordinance 1179E to be codified in LCC 17.10.126.

VIII. CONCLUSIONS OF LAW

A. This Board has jurisdiction over the parties in this case.

B. The following issues were not filed within the time period prescribed by RCW 36.70A.290(2): *Knutsen* Issues 7 and 8; *Smethers* Issues 3, 4, 5, 19(in part) and 20(in part).

C. The Board has subject matter jurisdiction over the remaining issues in the consolidated petitions for review.

D. The County is not in compliance with the Growth Management Act (Ch. 36.70A RCW) with respect to the following issues in which non-compliance was found in *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c, *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c, and *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c:

- *Smethers* Issues Nos. 6, 7, 8, 9, 12, 13, 15, 16, 17, 18, 19, 20 (non-compliant in *Butler* and *Panesko*) [6]
- *Vinatieri* Issues Nos. 2, 3, 4, 5, 6, 7, 8, 9, and 10 (non-compliant in *Butler* and *Panesko*)

[6] *Smethers* Issues 7, 8, 19 and 20 were found noncompliant only in part.

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E. The County is in compliance with the Growth Management Act (Ch. 36.70A RCW) with respect to the following issues in which compliance was found in *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c:

- *Knutsen* Issue No. 5

F. County Ordinance 1179B, Section 2 and LCC 17.20.015 is not in compliance with the Growth Management Act (Ch. 36.70A RCW) due to failure to include a public participation process in adopting a master planned location for an industrial land bank.

G. The County is in compliance with the Growth Management Act (Ch. 36.70A RCW) as to:

- Resolution 03-202 at Section B.1, insofar as it amends Chapter 4, Land Use Element, pages 4-6 and 4-7 pertaining to Major Industrial Developments
- Resolution 03-202 at Section B.3 adopting as part of the Comprehensive Plan Figure 16 B(1) Resource Lands Map to the extent of the changed portions of the map (elimination of the I-5/Highway 12 ILB and clarification of the location of the Centralia steam plant)
- LCC 17.102.050, as it has been amended, providing that ADUs must be either internal or attached to other structures in rural residential zones
- Ordinance 1179B, Section 2 and LCC 17.115.030, LCC 17.10.076 and LCC 17.115.030 as it pertains to private general aviation airports
- LCC 17.30.560(1)(b) and LCC 17.30.590(3)(c)
- The County's public participation procedures during the challenged adoptions
- The notice of hearing for adoption of Resolution 03-068 and Ordinance 1179E

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IX. ORDER

Based on the foregoing, the following issues are hereby CONSOLIDATED with the outstanding issues in *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c and DISMISSED from this case:

> *Vinatieri v. Lewis County*, WWGMHB Case No. 03-2-0020 (initial Petition for Review now consolidated into WWGMHB Case No. 03-2-0020c) Issues Nos. 2 – 10.

The following issues are hereby CONSOLIDATED with the outstanding issues in *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c and DISMISSED from this case:

> *Smethers v. Lewis County*, WWGMHB Case No. 03-2-0018 (initial Petition for Review now consolidated into WWGMHB Case No. 03-2-0020c) Issues Nos. 3 – 9 and 14 -20;

The following issues are hereby CONSOLIDATED with the outstanding issues in *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c and DISMISSED from this case:

> *Knutsen v. Lewis County*, WWGMHB Case No. 03-2-0016 (initial Petition for Review now consolidated into WWGMHB Case No. 03-2-0020c) Issue No. 5.

The sole remaining compliance issue in this case, the failure to include a public participation process in adopting a master planned location for an industrial land bank in County Ordinance 1179B, Section 2 and LCC 17.20.015, is hereby REMANDED to the County to achieve compliance with the public participation requirements of the Growth Management Act (Ch. 36.70A RCW). Because this issue is closely related to the issues still outstanding in the *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c, it shall be placed on the same compliance schedule, to-wit:

> The County shall submit a compliance report setting forth its actions to achieve compliance with this order, no later than August 24, 2004. The County shall provide a copy of its compliance report to Petitioners no later than August 24,

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2004. Petitioners shall file any objections to findings that the County is in compliance with the Board's order no later than September 7, 2004 and serve those objections upon the County. The County shall file any response to the Petitioners' objections no later than September 28, 2004, with service also upon Petitioners. All service of documents shall comport with the Board's earlier ruling, Order In Response To Motions Re: Parties And Service issued in *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c.

COMPLIANCE SCHEDULE

Compliance due date:	**August 10, 2004**
Compliance report due:	August 24, 2004
Objections due:	September 7, 2004
Response to objections due:	September 28, 2004
Compliance Hearing date:	**October 14, 2004**

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

SO ORDERED this 6th day of May, 2004.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
Margery Hite, Board Member

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Holly Gadbaw, Board Member

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Nan Henriksen, Board Member

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