BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

ROTH, et al., Petitioners, v. LEWIS COUNTY, Respondent, And CARDINAL FG COMPANY, Intervenor.	No. 04-2-0014c **FINAL DECISION AND ORDER**

SYNOPSIS OF DECISION

THIS case is a consolidation of two petitions for review – Roth v. Lewis County, WWGMHB Case No. 04-2-0013; and Olympia and Vicinity Building and Construction Trades Council and Affiliated Unions ("OBCT") v. Lewis County, WWGMHB Case No. 04-2-0014. Upon the motions of the County and the Intervenor, Cardinal FG Company ("Cardinal"), the Board dismissed Issues Nos. 2, 5, 7, 8, and 9 of the Amended Prehearing Order.[1] Order on Motions to Dismiss, September 10, 2004. We find here that the public participation procedures established by the County for the enactment of comprehensive plan amendments and development regulations for major industrial developments do not comply with RCW 36.70A.140; they fail to

[1] The Board held the issue regarding public participation for the Hearing on the Merits and the parties briefed it accordingly. However, the language of the Board's Order relative to Issue No. 4 caused some confusion and the Order on Motions to Dismiss will be amended to reflect that this issue was not dismissed, but that Issue No. 9 (invalidity based on the Master Site Plan Approval process allegations) was dismissed.

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provide for wide dissemination of procedures for early and continuous public participation in the development and amendment of comprehensive plan amendments and development regulations. We also find that the County failed to consult with the cities in establishing its process for approving major industrial developments as required by RCW 36.70A.365. However, we find that the notice provisions applicable to the consolidated hearing comply with RCW 36.70A.035; and we find that the County is not required to expressly incorporate the requirements of RCW 36.70A.035(2) into its public participation program. We also find that the Petitioners have not sustained their burden in showing that LCC 17.20.050 as amended substantially interferes with fulfillment of any goals of the Growth Management Act, RCW 36.70A.020.

ISSUES PRESENTED

Issue No. 1: Whether the amendment to Lewis County Code (LCC) 17.20.050 fails to comply with the requirement under RCW 36.70A.365 and RCW 36.70A.367 for consultation with the cities consistent with RCW 36.70A.210 for establishment of a process for reviewing and approving proposals for siting of specific major industrial developments or master planned major industrial locations outside of urban growth areas?

Issue No. 3: Whether the failure of the amendment to provide that notice must be given to cities of Lewis County and to other interested parties of an application for a proposed major industry under RCW 36.70A.365 or a major industrial land bank under RCW 36.70A.367 violates RCW 36.70A.035(1)?

Issue No. 4: Whether the amendment to LCC 17.20.050 creates a process that fails to comply with the public participation requirements of the GMA including RCW 36.70A.020(11), .035, .070, .106, .130, and .140?

Issue No. 6: Whether the amendment to LCC 17.20.050(4), to the extent it allows modifications of proposals by the Board of County Commissioners without hearing,

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fails to comply with the requirement of RCW 36.70A.035(2) that any change proposed after the period of review and comment has passed must not be made until the County has afforded an opportunity for review and comment by the public?

Issue No. 10: Whether the provisions of LCC 17.20.050 related to public participation should be found invalid for substantial interference with RCW 36.70A.020(5), (6), (7), and (11)?

BURDEN OF PROOF

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

> 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).

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). We review the challenges under the clearly erroneous standard.

DISCUSSION AND ANALYSIS

Issue No. 1: Whether the amendment to Lewis County Code (LCC) 17.20.050 fails to comply with the requirement under RCW 36.70A.365 and RCW 36.70A.367 for consultation with the cities consistent with RCW 36.70A.210 for establishment of a process for reviewing and approving proposals for siting of specific major industrial developments or master planned major industrial locations outside of urban growth areas?

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Petitioners argue that the County failed to consult with the cities in the county in establishing its process for reviewing and approving proposals for siting of specific major industrial developments. Roth, et al. Trial Brief, September 28, 2004. The County and Intervenor concede that the County did not expressly discuss the process it established for reviewing major industrial development applications with the cities but argue that the statute only requires that major industrial developments be a subject of the countywide planning policies. Cardinal FG Company's Response Brief and Motion to Strike, October 14, 2004; Respondent Lewis County's Joining of Intervenor Cardinal FG Company's Motion and Memorandum, October 14, 2004. Intervenor and County argue that the countywide planning policies do address major industrial developments and therefore the County is in compliance with this requirement of RCW 36.70A.365.

The statutory provision in question is found in the first paragraph of RCW 36.70A.365:

> A county required or choosing to plan under RCW 36.70A.040 may establish, in consultation with cities consistent with provisions of RCW 36.70A.210, a process for reviewing and approving proposals to authorize siting of specific major industrial developments outside urban growth areas.

According to this provision, the County must consult with cities and the consultation with cities must be consistent with the provisions of RCW 36.70A.210. RCW 36.70A.210 requires that counties meet with cities to establish a county-wide framework from which county and city comprehensive plans are to be developed. The argument of the Intervenor and County is that the earlier establishment of countywide planning policies encouraging economic development "in and out of UGAs" constitutes the necessary consultation under RCW 36.70A.365. They cite particularly CPP 5.0 of the Lewis County countywide planning policies.

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Petitioners, on the other hand, argue that the portion of RCW 36.70A.210 with which the consultation must be consistent is the portion directing that the county meet with the cities:

> (a) No later than sixty calendar days from July 16, 1991, the legislative authority of each county that as of June 1, 1991, was required or chose to plan under RCW 36.70A.040 shall convene a meeting with representatives of each city located within the county for the purpose of establishing a collaborative process that will provide a framework for the adoption of a county-wide planning policy…
>
> (b) The process and framework for adoption of a county-wide planning policy specified in (a) of this subsection shall determine the manner in which the county and the cities agree to all procedures and provisions including but not limited to desired planning policies, deadlines, ratification of final agreements and demonstration thereof, and financing, if any, of all activities associated therewith.

RCW 36.70A.210(2)(a) and (b) (in pertinent part).

RCW 36.70A.210 goes on to provide for sanctions if the county fails to convene its meeting with the cities (RCW 36.70A.210(2)(c), and provides what should happen in the event that the cities and county cannot agree (RCW 36.70A.210(2)(d)). Petitioners argue that the requirement that the County establish a process in consultation with the cities "consistent with provisions of RCW 36.70A.210" refers to this process. We agree.

In determining the meaning of a statutory provision, the object is to give effect to the legislature's intent. See, *e.g.*,*Deer v. DSHS*, 122 Wn. App. 84 at 89, __ P.3d __ (Div. II, 2004). This begins with the plain language of the statute. *Ibid.* The statute provides that a county that chooses to establish a process for reviewing and approving proposals to site major industrial developments is required to develop that process "in consultation with cities." The requirement of consultation with cities plainly refers to the establishment of a process for approving major industrial developments. In addition, the phrase "consistent with provisions of RCW 36.70A.210" modifies "consultation with cities"; therefore, it should be read to provide that the consultation

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shall be consistent with the provisions of RCW 36.70A.210. Taken together, these provisions direct that the cities must be consulted in the establishment of a process for approving major industrial developments in a manner consistent with the way that the cities were consulted for development of the countywide planning policy. RCW 36.70A.210(2) discusses this manner in some detail and those provisions are essentially incorporated by reference into RCW 36.70A.365.

It is not apparent why the County did not convene a meeting with the cities to discuss the establishment of a process for reviewing proposals for major industrial developments. At oral argument, the County argued strenuously that the cities were well aware of the Cardinal application. This may be. However, this does not relieve the County of its statutory obligation to consult with the cities in the establishment of its process for reviewing applications. Simply having a countywide planning policy that supports economic growth "in and out of UGAs" does not reach the specific statutory directive to consult with cities in establishing the process for reviewing major industrial developments.

The County and Intervenor argue that the Petitioners are "nit-picking." Cardinal FG Company's Response Brief and Motion to Strike, October 14, 2004 at 1; Respondent Lewis County's Joining of Intervenor Cardinal FG Company's Motion and Memorandum, October 14, 2004. Siting a major industrial development outside of existing urban growth areas has a potential significant impact beyond the County itself, and this provision of the GMA acknowledges the interest of cities in determining how such a process takes place. To ensure that the cities are included in the decision-making surrounding such important siting considerations, the legislature imposed a specific consultation requirement. This requirement is express and, if the legislature in its wisdom imposes a requirement by statute, it is not in our power to waive it, even if we wished to do so.

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Conclusion: The County's failure to consult with cities in establishing a process for reviewing and approving applications for major industrial developments is non-compliant with RCW 36.70A.365.

> Issue No. 3: Whether the failure of the amendment to provide that notice must be given to cities of Lewis County and to other interested parties of an application for a proposed major industry under RCW 36.70A.365 or a major industrial land bank under RCW 36.70A.367 violates RCW 36.70A.035(1)?

Petitioners argue that the amendments to LCC 17.20.050 do not comply with the notice provisions of RCW 36.70A.035(1). Roth, et al. Trial Brief at 4. Intervenor and Respondent reply that LCC 17.20.050 includes two of the examples of reasonable notice provided in the GMA and that "on their face," these methods of notice satisfy the notice provisions of the GMA public participation requirements. Cardinal FG Company's Response Brief and Motion to Strike at 8.

The amendments to LCC 17.20.050 provide for a consolidated public hearing on the application for a major industrial development, with the Planning Commission considering the comprehensive plan and development regulations amendments and the hearing examiner reviewing the master site plan. LCC 17.20.050(1). The challenged notice provisions are found in paragraph (2):

> Once the application is complete and environmental documents are completed, the County shall provide notice of the consolidated public hearing by publishing notice of the hearing not less than 10 days prior to the hearing and mailing notice to all property owners of record within 1,000 feet of the site. The County staff report and supporting materials shall be available to the public at the time of publication and mailing of the notice.

LCC 17.20.050(2).

Petitioners challenge the compliance of this provision with RCW 36.70A.035:

> The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners

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> and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulations. Examples of reasonable notice include:
>
> (a) Posting the property for site-specific proposals;
> (b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;
> (c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;
> (d) Placing notices in appropriate regional, neighborhood, ethnic, or trade journals; and
> (e) Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.

There is no requirement in the GMA that all types of notice must be provided and the County is correct that it has adopted two of the types of notice that the GMA expressly provides may be used to satisfy its notice requirements. The County further argued at the hearing on the merits that the published notice and the mailed notice to neighboring property owners are reasonably calculated to reach interested and affected parties against the kind of backdrop of a major industrial development application, which is big news in the community long before the consolidated public hearing. Given that the County has adopted two of the listed types of notice in RCW 36.70A.035, and that, under the circumstances, the notice provisions are reasonably calculated to reach affected and interested individuals, we find that this portion of the amendments to LCC 17.20.050(2) complies with RCW 36.70A.035.

Conclusion: We find that the notice provisions for the consolidated public hearing in LCC 17.20.050(2) comply with RCW 36.70A.035.

> Issue No. 4: Whether the amendment to LCC 17.20.050 creates a process that fails to comply with the public participation requirements of the GMA including RCW 36.70A.020(11), .035, .070, .106, .130, and .140?

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The amendments to LCC 17.20.050 create a two-track system for considering an application for a major industrial development, with the master plan review following a hearing examiner process and the amendments to the comprehensive plan and development regulations following a GMA process. We have found that such a two-track system complies with RCW 36.70A.365, since the elements of the process that deal with comprehensive plan amendment(s) and development regulations must comport with the GMA. Order on Motions to Dismiss, September 10, 2004.

However, new LCC 17.20.050 exempts amendments to the comprehensive plan and development regulations associated with the major industrial development from the County's normal public participation procedures:

> As anticipated in RCW 36.70A.365(3) and .367(4), amendments to the comprehensive plan and development regulations under LCC 17.20.050 shall be separate from the annual comprehensive plan amendment process specified in LCC 17.12.

LCC 17.20.050(1)(in pertinent part)

This raises the question whether the public participation process applicable to the comprehensive plan amendments and development regulations for major industrial developments complies with the GMA public participation requirements.

Petitioners argue that the public participation procedures that apply to major industrial developments under LCC 17.20.050, since they do not include the comprehensive plan amendment public participation procedures of LCC 17.12.050, fail to provide for early and continuous public participation as required by RCW 36.70A.140. Roth, et al. Trial Brief at 3. The Intervenor/County responds that the statute expressly provides that RCW 36.70A.130(2) does not apply to comprehensive plan and development regulation amendments for major planned locations, so it is appropriate to exclude

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those amendments and development regulations from the County's normal public participation procedures.

Again, we turn to the language of RCW 36.70A.365:

> Final approval of an application for a major industrial development shall be considered an adopted amendment to the comprehensive plan adopted pursuant to RCW 36.70A.070 designating the major industrial development site on the land use map as an urban growth area. *Final approval of an application for a major industrial development shall not be considered an amendment to the comprehensive plan for the purposes of RCW 36.70A.130(2) and may be considered at any time.*
> RCW 36.70A.365(3)(emphasis added)

The Intervenor/County argues that this language means that the public participation requirements of RCW 36.72.130(2) do not apply to major industrial developments.[2]

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[2] RCW 36.70A.130(2) provides: Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and RCW 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year. "Updates" means to review and revise, if needed, according to subsection (1) of this section, and the time periods specified in subsection (4) of this section. Amendments may be considered more frequently than once per year under the following circumstances:

(i) The initial adoption of a subarea plan that does not modify the comprehensive plan policies and designations applicable to the subarea;
(ii) The adoption or amendment of a shoreline master program under the procedures set forth in chapter 90.58 RCW; and
(iii) The amendment of the capital facilities element of a comprehensive plan that occurs concurrently with the adoption or amendment of a county or city budget.

(a) Except as otherwise provided in (a) of this subsection, all proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained. However, after adequate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court.

RCW 36.70A.130(2).

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Petitioners, on the other hand, argue that the language providing that final approval of a major industrial development is not considered a comprehensive plan amendment for purposes of RCW 36.70A.130(2) only means that comprehensive plan amendments for siting major industrial developments may be considered at any time. They focus on the statutory language that says "Final approval of an application for a major industrial development shall not be considered an amendment to the comprehensive plan for the purposes of RCW 36.70A.130(2) *and may be considered at any time*."

Because RCW 36.70A.130(2) is the only section of RCW 36.70A.130 that deals with public participation programs, it is possible to read the provision as removing major industrial development approvals from the public participation program requirements of RCW 36.70A.130(2). However, the public participation program requirements of the Act do not primarily arise from this provision. They are found in RCW 36.70A.035 and RCW 36.70A.140. In fact, RCW 36.70A.130(2) refers to RCW 36.70A.035 and RCW 36.70A.140 for the requirements of a public participation program applicable to comprehensive plan amendments and development regulations. RCW 36.70A.365 did not exempt major industrial developments from compliance with either of these major public participation program requirements. Therefore, it makes sense to read the reference to RCW 36.70A.130(2) as addressed to the timing requirements for consideration of comprehensive plan amendments, which are uniquely addressed in RCW 36.70A.130(2).

Further, even if RCW 36.70A.365(3) were to be considered as exempting major industrial development application approvals from the public participation program requirements of RCW 36.70A.130(2), the provisions of RCW 36.70A.140 and RCW 36.70A.035 would still apply. RCW 36.70A.365 (3) provides that a major industrial development "shall be considered an adopted amendment to the comprehensive plan *adopted pursuant to RCW 36.70A.070* designating the major industrial development

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site on the land use map as an urban growth area." (emphasis added). RCW 36.70A.070 states: "A comprehensive plan shall be adopted and amended with participation as provided by RCW 36.70A.140." RCW 36.70A.140 expressly requires a public participation program providing for early and continuous public participation "in the development and amendment of comprehensive land use plans and development regulations implementing such plans." Therefore, with or without RCW 36.70A.130(2), there must be a public participation program that meets the requirements of RCW 36.70A.140 for the comprehensive plan amendment(s) and development regulations required for approval of a major industrial development.

The County's procedures for approval of applications for major industrial developments provide for submission of an application, preparation of environmental documents, and a consolidated public hearing upon ten days notice to the public and to surrounding property owners. LCC 17.20.050(2). We must determine whether this process provides early and continuous public participation in compliance and adequate notice in accordance with RCW 36.70A.140 and 36.70A.035.

RCW 36.70A.140 gives explicit direction about what must be involved for public participation procedures:

> The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments.
> RCW 36.70A.140 (in part).

The County/Intervenor has provided the Board with a list of public participation procedures applicable to major industrial development applications. Lewis County and Cardinal FG Company's Joint List of Public Participation Procedures. These include publication of a Notice of Application within 14 days of the date the County determines the application is complete, pursuant to RCW 36.70A.110. *Ibid.* Notice of

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the complete application is followed by a 14-30 day public comment period, which may be combined with the County's SEPA process. LCC 17.110.170(1); RCW 36.70B.110(6). *Ibid.* Thereafter, the County determines whether an environmental impact statement ("EIS") must be prepared and, if so, follows the SEPA procedures for an EIS. *Ibid.* The proposed master plan is reviewed by the Hearing Examiner and follows the County procedure for a project review. The comprehensive plan amendment(s) and development regulations are reviewed by the Planning Commission. *Ibid.*

Petitioners argue that none of these procedures are referenced in Ch. 17.20 LCC and that, in particular, they do not show how the inventory of developable land required by RCW 36.70A.365(2)(h) will be provided to the public. Roth, et al. Post Hearing Reply Brief.

The County/Intervenor appears to argue that its project application for a major industrial development addresses all the requirements for approval of a major industrial development pursuant to RCW 36.70A.365. However, the elements of the application set out in LCC 17.20.030 and the County/Intervenor brief are not co-extensive with the requirements of the statute. The project application elements are addressed to the master site plan, not to the GMA concerns with changing the land use designation for the proposed new urban growth area that the major industrial development would require.

The County/Intervenor argues that the environmental impact statement will address all of those concerns. However, while an environmental impact statement may address the requirements for new infrastructure and its funding; traffic impacts; buffers between the new industrial area and adjacent non urban areas; environmental protection; and mitigation of adverse impacts on natural resource lands and critical

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areas; there is nothing in the County's ordinance requiring that it do so. Nor is there anything in the ordinance advising the public of what steps the County must follow and how the public may participate along the way. The requirement in RCW 36.70A.140 that the County establish a "public participation program that is broadly disseminated" is further evidence of a legislative intent to ensure that the public has full information on how to participate in planning policies and regulations, without requiring a specialized land use legal expertise to determine how to participate.

As Petitioners point out, there is also the question of the inventory of developable land. This requirement does not arise out of an environmental review but from the GMA's direction that the County consider available land within already designated UGAs before it re-designates non-urban lands for major industrial developments. RCW 36.70A.365(2)(h). There is nothing in the County's ordinance that even mentions this inventory, much less makes allowance for the public to participate in its creation and evaluation.

Conclusion: We find that the amendments to Ch. 17.20 LCC fail to comply with the public participation requirements of the GMA by failing to provide for early and continuous public participation in that portion of the major industrial development approval process dealing with comprehensive plan amendment(s) and development regulations. Further, while we have found that the notice provisions for the *consolidated hearing* comply with RCW 36.70A.035, this does not mean that the challenged ordinance amendments provide adequate public notice of the additional steps that should be added to ensure adequate opportunities for public participation. Until those additional steps are established, the notice requirements for them cannot be determined to be compliant.

Issue No. 6: Whether the amendment to LCC 17.20.050(4), to the extent it allows modifications of proposals by the Board of County Commissioners

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> without hearing, fails to comply with the requirement of RCW 36.70A.035(2) that any change proposed after the period of review and comment has passed must not be made until the County has afforded an opportunity for review and comment by the public?

The parties agree that the County's ordinance fails to qualify the ability of the Board of County Commissioners to "accept, modify or reject the recommendations of the … Planning Commission," with respect to the comprehensive plan amendment and development regulations applicable to a major industrial development. LCC 17.20.050(4). Further, the parties agree that the County is bound by RCW 36.70A.035(2), which requires that the public be given an opportunity to review and comment upon (most) proposed changes if they are proposed after the opportunity for review and comment under the County's procedures has passed.

However, Petitioners and County/Intervenor disagree about the necessity for the County code provisions to include the requirements of RCW 36.70A.035(2) in them. The County/Intervenor argues that "[t]here is simply no requirement to repeat GMA requirements (or other statutory or constitutional requirements) within the text of a county or city code." Lewis County and Cardinal FG Company's Joint List of Authorities at 6. Petitioners, on the other hand, argue that the County's ordinance must be enacted to carry out the mandate of the state statute. Roth Post Hearing Supplemental Brief at 3. They point to the "basic rule for determining whether an ordinance conflicts with state law":

> The basic rule for determining whether an ordinance conflicts with state law is whether the ordinance attempts to authorize what the Legislature has forbidden or does it forbid what the Legislature has expressly licensed, authorized, or required. *State v. Rabon*, 45 Wn. App.832, 835, 727 P.2d 995 (1986), *Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P. 2d 292, 92 A.L.R. 2d 192 (1960).

Roth Post Hearing Supplemental Brief at 2.

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The Petitioners' argument suggests that the failure to include conditions on the ability of the County Commissioners to modify a proposal from the Planning Commission in the challenged county code provision means that modification could occur without further public input.

On the other hand, we note that the ordinance does not provide that there shall be no public input after modification; it is simply silent on that point. The County/Intervenor argues that ordinances should be read to harmonize with State law and clearly this is correct. See *King County v. Taxpayers of King County*, 132 Wn.2d 360, 367, 938 P.2d 309 (1997) (a conflict only exists if the statute and the ordinance cannot be harmonized); and *Ayers v. Tacoma*, 6 Wn.2d 545, 554, 108 P.2d 368 (1940).

Under the County's public participation program for comprehensive plan amendments and development regulations generally, there is no mention of either RCW 36.70A.035(2) or the necessity for allowing public comment on substantive changes to the Planning Commission's recommendations. Ch. 17.12 LCC. However, optional hearing procedures are built into the public participation program:

> After the public hearing, the Board of County Commissioners may hold one or more workshops to consider matters raised during the hearings or in the writings submitted, and shall take such final action at a public hearing or meeting, as the Commission deems appropriate and in the public interest.

LCC 17.12.050(3)(c)

We have already found that the public participation procedures for comprehensive plan amendments and development regulations pertaining to a major industrial developments do not provide for early and continuous public participation and therefore fail to comply with RCW 36.70A.140. The failure to specifically provide for an opportunity for public comment if substantive changes are made to the Planning Commission recommendations does not in itself make the ordinance non-compliant.

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However, there must be reasonable opportunities for the public to participate throughout the approval process.

Conclusion: We find that it is not necessary for LCC 17.20.050(4) to expressly provide for an opportunity for public review and comment if substantive changes are made by the County Commissioners so long as the County code provides reasonable opportunities for early and continuous public participation *throughout* the approval process. Since we find that the County code does not presently provide for such early and continuous public participation, the County must revise the public participation procedures applicable to major industrial developments to ensure that such opportunities are established.

> Issue No. 10: Whether the provisions of LCC 17.20.050 related to public participation should be found invalid for substantial interference with RCW 36.70A.020(5), (6), (7), and (11)?

Petitioners ask the Board to find that LCC 17.20.050 as it relates to public participation is invalid because it substantially interferes with RCW 36.70A.020(5), (6), (7), and (11). These are goals of the GMA: (5) Economic Development; (6) Property Rights; (7) Permits; and (11) Citizen participation and coordination. Invalidity may only be imposed as to those provisions of an enactment about which there is a finding of noncompliance. RCW 36.70A.302(1)(a). While we have found that the public participation provisions of LCC 17.20.050 are noncompliant with the public participation requirements of the GMA, we have not found that this implicates the economic development, property rights, or permitting goals of the GMA. We decline to expand our reasoning to include those goals.

In addition, we are not persuaded that the County's ordinance substantially interferes with the fulfillment of the citizen participation and coordination goal either. The County must bring its ordinance into compliance; but it is not clear that a specific project could not be approved which did meet the public participation goals of the

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GMA, despite the inadequate language of the County's ordinance. Further, to the extent that the concern is that the Cardinal FG Company application for a major industrial development might vest to these procedures, petitions filed to review that approval indicate that the Cardinal FG Company application for a major industrial development was approved on September 23, 2004. See, e.g., Panesko v. Lewis County, 04-2-0027. A finding of invalidity of LCC 17.20.050 would not affect that application.

Conclusion: Petitioners have not sustained their burden of showing that the continued validity of LCC 17.20.050 would prevent proper planning from occurring in the future.

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 two petitions for review - Roth v. Lewis County, WWGMHB Case No. 04-2-0013; and Olympia and Vicinity Building and Construction Trades Council and Affiliated Unions ("OBCT") v. Lewis County, WWGMHB Case No. 04-2-0014.
3. The Petitioners have participated in person or in writing in the legislative adoption proceedings in Lewis County with respect to the issues raised in the petitions for review.
4. The countywide planning policies in Lewis County encourage economic development "within and without the UGAs."
5. The County failed to consult with the cities in Lewis County in establishing a process for reviewing applications for major industrial developments, pursuant to RCW 36.70A.365.
6. The challenged amendments (LCC 17.20.050) provide that notice of the consolidated hearing on the major industrial development application must be provided by publication and by mailing written notice to property owners within 1000 feet of the proposed development.
7. Against the backdrop of a major industrial development application, the notice provisions for the consolidated hearing are reasonably calculated to reach affected and interested individuals.
8. There must be a public participation program that meets the requirements of RCW 36.70A.140 and 36.70A.035 for the comprehensive plan amendment(s)

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and development regulations required for approval of a major industrial development.

9. The amendments to LCC 17.20.050 exempt amendments to the comprehensive plan and development regulations associated with the major industrial development from the County's normal public participation procedures.
10. The public participation procedures applicable to major industrial developments under LCC 17.20.050 (as amended) provide for publication of a Notice of Application within 14 days of the date the County determines the application is complete, pursuant to RCW 36.70A.110. Notice of the complete application is followed by a 14-30 day public comment period, which may be combined with the County's SEPA process.
11. Thereafter, the County determines whether an environmental impact statement ("EIS") must be prepared and, if so, follows the SEPA procedures for an EIS.
12. The proposed master plan is reviewed by the Hearing Examiner and follows the County procedure for a project review. The comprehensive plan amendment(s) and development regulations are reviewed by the Planning Commission.
13. While an environmental impact statement may address the requirements for new infrastructure and its funding; traffic impacts; buffers between the new industrial area and adjacent non-urban areas; environmental protection; and mitigation of adverse impacts on natural resource lands and critical areas; as required for approval of a major industrial development, there is nothing in the County's ordinance requiring that it do so.
14. The project application elements are addressed to the master site plan, not to the GMA concern of changing the land use designation for the proposed new urban growth area that the major industrial development would require.
15. There is nothing in the ordinance advising the public of what steps the County must follow in reviewing and approving the comprehensive plan amendment(s) and development regulations needed for a major industrial development nor is there any description of how the public may participate along the way.
16. The requirement in RCW 36.70A.140 that the County establish a "public participation program that is broadly disseminated" is further evidence of a legislative intent to ensure that the public has full information on how to participate in planning policies and regulations, without requiring a specialized land use expertise to determine how to participate.
17. There is nothing in the County's ordinance that mentions the inventory of developable land that the County is required to undertake under RCW 36.70A.365 as part of its review and approval of a major industrial development.
18. The amendments also fail to make allowance for the public to be apprised of, participate in, or comment upon the required inventory of developable land.

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19. The amendments to LCC 17.20.050 fail to expressly qualify the ability of the Board of County Commissioners to "accept, modify or reject the recommendations of the Planning Commission," with respect to the comprehensive plan amendment and development regulations applicable to a major industrial development, without further opportunity for public review and comment.
20. The ordinance does not provide that there shall be no public input after any modification of the recommendations of the Planning Commission; it is simply silent on that point.
21. It is not necessary for LCC 17.20.050(4) to expressly provide for an opportunity for public review and comment if substantive changes from the Planning Commissions recommendations are made by the County Commissioners so long as the County code provides reasonable opportunities for early and continuous public participation *throughout* the approval process.

FINDINGS OF FACT RELATED TO REQUEST FOR INVALIDITY

22. The County could, in practice, follow proper public participation procedures in the approval of an application for a major industrial development even if its written ordinance did not require them.
23. Since the County has already accepted and approved the Cardinal FG Company's major industrial development application (approved on September 23, 2004), a finding of invalidity of LCC 17.20.050 at this time would not affect that application.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the subject matter and parties to this dispute.
2. The Petitioners have standing to challenge the issues raised in the petitions for review.
3. The County failed to consult with the cities of Lewis County in establishing the process for reviewing and approving applications for major industrial developments and therefore LCC 17.20.050 fails to comply with RCW 36.70A.365.
4. The amendments to LCC 17.20.050 fail to provide for early and continuous public participation as required by RCW 36.70A.140 and RCW 36.70A.035 and therefore fail to comply with the Growth Management Act.
5. Petitioners have failed to meet their burden of showing that the amendments to LCC 17.20.050 substantially interfere with fulfillment of the goals of the Growth Management Act, RCW 36.70A.020.

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ORDER

The County shall bring LCC 17.20.050 into compliance with the Growth Management Act within 120 days of the date of this order. The following schedule shall apply:

Compliance due	April 4, 2005.
County's Report of Actions Taken Due	April 14, 2005.
Written Objections to a Finding of Compliance Due	April 25, 2005.
County's Response Brief Due	May 5, 2005.
Compliance Hearing (location to be determined)	May 10, 2005.

The remand period shall extend until the Board issues its order on compliance hearing.

This is a final order for purposes of appeal pursuant to RCW 36.70A.300(5) and for reconsideration pursuant to WAC 242-02-832.

Entered this 9th day of December, 2004.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
Margery Hite
Presiding Officer

_____
Holly Gadbaw
Board Member

_____
Gayle Rothrock
Board Member

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