

**Summary of Recent Cases Before  
Washington’s Growth  
Management Hearings Boards  
January-June, 2004**

*This is not a complete review of the cases, nor does it constitute a legal opinion. For more information, consult the Growth Management Hearings Boards or consult your legal counsel.*

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***Panesko et al. v. Lewis County, WWGMHB Case No. 00-2-0031c and Butler et al. v. Lewis County, WWGMHB Case 99-2-0027c, February 13, 2004***

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***Factual and Procedural Background***

This decision addressed resource lands issues remaining from challenges initially decided in June 2000 and March 2001. The issues that Lewis County faced in this second compliance order, dated July 12, 2002, involved designation of agricultural resource lands, adoption of development regulations (DRs) to ensure their

conservation, and eliminating nonresource uses in resource lands.

Lewis County stated that its duty is to “conserve agricultural lands in order to maintain and enhance the agricultural industry.” It focused its process and analysis on the needs of the agricultural industry currently in Lewis County.

Lewis County designated 14,000 acres with prime soils as Class A farmland and designated about 40,000 additional acres, in the flood hazard zone, as Class B farmland. As of 1997, 117,000 acres of Lewis County farmland were in agricultural use, and 66,000 acres were classified agricultural for tax purposes.

The petitioners alleged Lewis County failed to adequately designate four categories of agricultural land:

- ◆ Lands in agricultural use but without water rights.
- ◆ Lands with prime soils in areas of low population density.
- ◆ Agricultural lands between the cities of Napavine and Winlock.
- ◆ Agricultural lands outside of floodways.

Petitioners also alleged that ten separate sections of county code fail to conserve agricultural lands and allowed nonresource uses in resource lands. On this latter matter, Lewis County approached its task from the perspective of allowing uses that assist farmers in making a living on the farm.

***Board’s Decision***

Lewis County’s criteria for designating agricultural land included irrigation capacity and current use in agriculture. The Board rejected this focus on the current and future agricultural economy as a proper basis for agricultural land designation. It emphasized that “throughout the GMA and the court

decisions construing it, the focus is on the nature of the *land*, not the nature of the agricultural industry that is using the land at any given time.” This holding was later reversed by the Supreme Court (citation)

The Board noted that the short-term need for agricultural is varied and unpredictable. The GMA requires a long-term strategy to conserve the natural resource base for farming because, once converted, it cannot be converted back to agricultural use.

### ***Designation Criteria***

The Board rejected the criteria that required Class A farmland to have “sufficient irrigation capability.” The term was not defined by the County. The county used these criteria to exclude lands that were currently being used for farming. Two important types of farming in Lewis County, hay and Christmas tree farms, did not require irrigation.

The Board also rejected the decision to remove previously designated agricultural land between the towns of Napavine and Winlock on the grounds of likely future development. Although the county’s designation criteria excluded land inside an urban growth area (UGA), these lands were not currently in the UGA. The Board ruled that excluding them based on a potential future UGA expansion was an improper application of the county’s criteria.

### ***Resource Lands Isolation***

The Board emphasized that designation should be an area-wide determination. The Board, when reviewing the record, was concerned that county’s designation approach resulted in designations that were limited and in isolated tracts. Such isolated parcels are both more vulnerable to compatibility problems from adjacent uses and are more likely to be de-designated in the future, based on the County’s criteria.

Further, by excluding the land used for “farm homes” and “farm centers” from designated agricultural lands in order to expand allowed uses in those areas, the county improperly promoted the segregation, not the conservation, of these lands and allows non-farm development on portions of agricultural lands.

### ***Development Regulations***

Lewis County’s regulations allowed many uses in agricultural resource lands. The hope was that the supplemental income from these other uses would allow farmers to continue farming.

The requirements in the RCW 36.70A.170 are two-fold: to ensure conservation of resource lands and prevent interference with resource operations from incompatible adjacent uses. These were the requirements the Board applied in deciding this issue.

Using this framework, the Board approved the following uses in agricultural resource lands, so long as they do not interfere with agricultural use or remove agricultural land from production:

- ◆ Farm worker housing and housing for immediate family members involved in on-farm agricultural activities.
- ◆ Airplane landing strips *in aid of* an activity such as crop dusting.
- ◆ Watershed management facilities to control water on the farm.
- ◆ Home-based businesses when limited in size and scope to prevent interference with agricultural activities or prime soils.

The Board rejected the following in agricultural resource lands:

- ◆ Unrestricted mining activities as a primary use.
- ◆ Unlimited farm employee and immediate family member housing.

- ◆ Telecommunications facilities, public and semipublic buildings.

The Board narrowly rejected some of the code provisions allowing for uses in agricultural lands. For example, while the Board recognized that cluster housing is a permitted technique, a county may use it *for the purpose* of conserving agricultural lands. This requires that its use ensures that new residences are located on soils that are not suitable for agricultural purposes. The Board rejected Lewis County’s cluster housing option in agricultural land because it does not require a review for impacts on agricultural lands.

Another code provision at issue allowed the siting of essential public facilities on agricultural resource lands. While acknowledging that roads, bridges, pipelines, and utility lines might need to pass through agricultural lands, the Board found the specific code provision to be noncompliant because it did not prevent interference with agricultural activity.

The Board suggests that the many of the proposed uses rejected for agricultural lands are instead appropriate for the large portion of land in the County that is zoned rural. The Board also acknowledged that other governmental efforts might be necessary to support the agricultural economy.

The Board implied that some of the uses might be allowable in agricultural land if a larger percentage of the county’s agricultural land had been designated for long-term commercial agriculture.

The Board kept in force most of its prior determination of invalidity in order to prevent incompatible development of land ultimately designated as agricultural. It lifted the invalidity determination on the accessory uses allowed, finding that they were, by definition, resource-related.

### ***GMA Implications and Practice Tips***

The decision in this case was subsequently appealed to the Washington State Supreme Court, which issued a decision partially upholding and partially reversing the Board’s decision.

In determining whether to designate a parcel as agricultural land, a county must focus on both the nature of the land and on the specific needs of the agricultural industry in the county. Designation decisions should be based on a three-pronged test:

1. Is the land not already characterized by urban growth;
2. Is the land “used or capable of being used for agriculture”; and
3. Does it have the “long-term commercial significance”? A review of agricultural resource lands designations should address all these issues.

Striking the appropriate balance when addressing these factors will be the key policy challenge in any review of agricultural resource lands designation.

However, evaluations of economic conditions should focus on agricultural economics of the county as a whole and should not be based on the economic situation of any particular farming operation. Landowner intent is a decisive factor in a designation decision.

Exclusions or regulatory provisions that create isolated pockets of agricultural land create problems for the required conservation of that land. Designation (and de-designation) should be approached as an area-wide determination. Resource lands designations should strive to preserve resource lands in significant blocks or districts to facilitate continued resource production.

Where allowed uses in agricultural or forest lands are not resource-related, they must be

restricted so that they do not take the place of, or interfere with, agricultural or forest uses. New legislation since this case was decided has clarified that counties have flexibility in allowing accessory uses. However, the fundamental requirements in RCW 36.70A.170 remain. Accessory uses should not convert prime agricultural soils and accessory uses must not interfere or be incompatible with use of adjacent resource lands for resource production. In addition, this standard should be applied to innovative zoning techniques adopted under RCW 36.70A.177. When developing innovative zoning techniques, the staff report should include an evaluation of these two issues.

***1000 Friends of Washington and Glenrose Community Assoc. v. Spokane County, EWGMHB Case 03-1-0004, May 25, 2004***

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***Factual and Procedural Background***

Spokane County initially adopted a GMA comprehensive plan (CP) in November 2001. In its plan adoption process, the Board of County Commissioners made 51 changes to the map and 21 policy changes from the recommended Planning Commission proposal before it. Following a challenge that the Commissioner's adoption process did not comply with GMA public participation requirements, the Board remanded the 2001 CP to the county for further public hearings.

After the additional public hearings and plan adoption, petitioners then challenged 12 of the 72 changes the Board of County Commissioners made to the Planning Commission proposal and also challenged the Board's use of an addendum to address compliance with the State Environmental Policy Act (SEPA). The plan items at issue involved designation of limited areas of more intense rural development (LAMIRDs)

and zoning changes. The petitioner later abandoned four of the challenged items.

Of the challenged LAMIRD designations, the petitioner alleged that three changes expanded or inappropriately designated LAMIRDS. Four other challenges involved rezoning within the LAMIRD, and one alleged that one area was improperly included in the UGA.

***LAMIRD Designations***

One of the challenged LAMIRD designations was the vacant eastern half of a 50-acre area that had been zoned industrial for decades. The western half has pre-GMA industrial uses on its northern and southern parts, with the middle undeveloped. Roads bound all four sides of the full 50-acre area, with a railroad on the southern border and suburban density housing to the east.

Although the Board upheld the County designation of the western half of the 50-acre area, it deemed improper the LAMIRD designation for the vacant eastern half. Despite the pre-existing industrial zoning, the Board concluded that RCW 36.70A.070(5) required that the property have a preexisting *use*. The Board distinguished between the "area of potential infill due to preexisting built environment" on the western half and the "completely undeveloped" eastern half.

Three other parcels with large undeveloped acreage were challenged on similar grounds. Because all three had existing commercial or industrial activity and were parts of larger LAMIRDs, the Board upheld their designation. On one, a 10-acre parcel, with a trucking business on a portion on it, the Board indicated that while "single parcel ownership is not, in itself, sufficient reason to include large [undeveloped] areas," the petitioner failed to overcome the presumption of validity.

Another contested LAMIRD designation consisted of 10 acres at the northeast corner of the intersection of a major state highway and a county road. There were businesses and preexisting development on the other three corners. Although the northeast corner was an undeveloped parcel, the Board approved the Logical Outer Boundary formed by including that vacant corner, deeming it “appropriate infill” at a busy rural crossroads.

### ***Zoning Changes***

Petitioners also challenged zoning changes to five parcels, allowing higher density from the Planning Commission. The petitioners argued that the higher density (from 1/20 acres or 1/40 acres per dwelling unit to 1/10 acres per dwelling unit) failed to protect critical areas, failed to conserve agricultural lands, and allowed sprawl. The petitioners argued that a property was wrongly included in the UGA.

The Board upheld all of the challenged County zoning changes. It noted that rezoning a parcel to allow 1/10 acre density does not automatically cause the loss of the function and value of the critical areas, and that farming may still occur on lands not designated as agricultural lands. Because the petitioner failed to present any evidence or analysis other than arguing that the County used an incorrect population allocation, the Board affirmed inclusion of the contested property in the UGA.

### ***SEPA Addendum***

The County used a SEPA Addendum for its 2002 GMA amendment process for revising the CP. The petitioner alleged the CP amendments were not within the range of alternatives previously analyzed under SEPA, and that the County should have prepared a new or supplemental EIS. The Board did not find the County’s actions clearly erroneous, noting that

WAC 197-11-600 allows an addendum when “it adds analysis or information about a proposal but does not substantially change the analysis.”

### ***GMA Implications and Practice Tips***

At a busy crossroads, where three corners have businesses and buildings, the Logical Outer Boundary for a LAMIRD may include a vacant corner. In other circumstances, the Logical Outer Boundary for a LAMIRD must have manmade structures in place as of July 1, 1991.

However, when confronted with large parcels with development on a relatively small portion of it, split parcel zoning may be less problematic than including large amounts of vacant land in a LAMIRD. This is especially true if the result would be a substantial increase in development potential within a LAMIRD.

Zoning changes from 1/20 acres or 1/40 acres per dwelling unit to 1/10 acres per dwelling unit do not automatically preclude protection of the functions and values of critical areas and do not preclude on-going farming practices.

### ***City of Sedro-Woolley, Friends of Skagit County, et al. v. Skagit County, WWGMHB Case 03-02-0013c, June 18, 2004***

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### ***Factual and Procedural Background***

This decision consolidates four earlier cases from Skagit County addressing policies governing provision of urban service, regulation of development and annexation of lands within a UGA. Each of the cases involved a plan by the county and its cities to develop and adopt a series of interlocal agreements under which Skagit County would adopt and implement the cities’ DRs within each of the cities’ respective UGAs.

In an earlier decision, the Board found DRs for unincorporated portions of Skagit County UGAs out of compliance. In that case and the others, the Board granted requests by Skagit County and its cities for extra time to implement the agreed-to interlocal agreement approach.

The challenge giving rise to this case was initiated by the City of Sedro-Woolley after the Skagit County Board of County Commissioners refused to adopt the City DRs regarding sewer infrastructure in the unincorporated Sedro-Woolley UGA. The DRs at issue require any landowner creating new lots – including short subdivisions – to install urban sewer and street infrastructure or provide infrastructure funding through bonding or payment.

Skagit County sought to approve, through a variance process, short subdivisions without the required infrastructure. While adopting some DRs, it considered the sewer infrastructure DR to be unfair to small property owners with few financial resources by subjecting short plats of their property to the same expensive infrastructure requirements as full subdivisions – or, alternatively, requiring those property owners to wait up to 20 years to be able to develop their property after the city built the infrastructure.

Ultimately, instead of adopting the Sedro-Woolley DRs, Skagit County agreed to adopt an interim ordinance limiting subdivision in its unincorporated UGA to allow no more than 1 unit per 5 acres.

### ***Board's Decision***

The Board separately discussed compliance in the Sedro-Woolley UGA and in unincorporated portions of UGAs countywide. It did not agree that it is unfair for property owners on the periphery of the UGA to have to wait for infrastructure to arrive, noting that if those landowners had

not been included in the UGA, they could never have divided their property into lots smaller than five acres.

The Board concluded that Skagit County's selective approach to the interlocal agreement, adopting some of the city's DRs and not others, allowed development through subdivisions at densities greater than allowed in rural areas, but less than needed for urban areas. This pattern presented problems both for meeting concurrency and for assuring transformation of governance. The Board agreed with Skagit County that one solution might be re-examination of the Sedro-Woolley UGA boundary.

The Board agreed with Sedro-Woolley that the adoption of some DRs but not others would allow inappropriate urban development without a plan for urban services. It dismissed Skagit County's suggestion for a zoning technique known as shadow platting in the Sedro-Woolley UGA – allowing lower density development today with the promise of allowing higher density at a later date when the infrastructure is provided. Shadow platting may be possible, the Board conceded, if there were measures for interim infrastructure or a system to ensure that infrastructure ultimately could be provided, such as payment of impact fees. But that was not the situation in Sedro-Woolley.

The Board found the Skagit County DRs for the unincorporated portion of the Sedro-Woolley UGA noncompliant for failing to ensure that urban densities occur in tandem with urban levels of service and by providing no incentive for property owners to agree to annexation – or for the city to be willing to annex.

In the portion of its decision on compliance countywide, the Board begins by noting that the provision of urban levels of service to

urbanized areas is a central requirement of GMA. It repeatedly stresses the difficulty of providing urban services to an area once it is populated with residential lots at less than urban density.

Development of a UGA over its 20-year life span should direct growth first to those parts of the UGA that have urban services or to which they can be provided. Land to which urban services cannot be provided should be left out of the UGA.

Efficient phasing of urban infrastructure is the key to transforming an area from county to city government. The Board further added that assurance of annexation should occur before extension of infrastructure to the unincorporated portions of a UGA. It explained that extension of urban services is the primary inducement that cities have to bring unincorporated areas into their cities.

In conclusion, the Board directed Skagit County to adopt a set of DRs, within the cities' respective UGAs, which would ensure development at urban densities with concurrent urban infrastructure, and facilitate the transformation of governance. It added that mere adoption of interlocal agreements is not enough because the interlocal agreement itself does not govern land development. It is the DRs themselves that will govern the development review process. In addition, Skagit County and its cities must negotiate provisions to facilitate annexation and adopt measures for urban development to occur once urban infrastructure and services are available.

The Board declined to invoke invalidity, given the County's agreement to keep in place an interim ordinance limiting subdivision in the unincorporated UGA to no smaller than five-acre lots. There was, therefore, no substantial interference with the goals of the Act so long as the creation

of new lots smaller than five acres was forbidden.

### ***GMA Implications and Practice Tips***

One of the central requirements of the GMA is that, as UGAs develop, they do so in a manner that facilitates provision of urban services. Because areas within the unincorporated UGA fall within county jurisdiction, counties have a duty to ensure that its development regulations do so.

Where urban services cannot be provided throughout the UGA immediately, phasing plans must ensure that prior development does not occur in a pattern that will thwart future development at urban densities and with urban services.

Where a county plans to meet the concurrency and transformation of governance requirements of GMA by implementing the city's regulations, the county has an ongoing obligation to adopt new and amended city DRs that apply to development within the unincorporated portion of the UGAs. Even if not all the city's regulations are adopted, the sum total of what is in force within the UGA must meet the goals and requirements of the GMA.

Development of a UGA over its 20-year life span should direct growth first to those parts of the UGA that have urban services or to which they can be provided. Policies or agreements to ensure annexation should occur before extension of infrastructure within the unincorporated portions of a UGA. Land to which urban services cannot be provided within the 20-year timeframe should be excluded from a UGA.

***1000 Friends of Washington v. Snohomish County, CPSGMHB Case 03-3-0026, June 21, 2004***

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***Factual and Procedural Background***

In 2000 Snohomish County created a 125-acre limited area of more intensive rural development (LAMIRD) in the Clearview area along SR-9. The LAMIRD was challenged, found noncompliant with GMA, and remanded by the Board. On remand, the County established two separate LAMIRDs from the area in dispute, a 16.5-acre north node, centered at the intersection of SR-9 and 164<sup>th</sup> Street, and an 80-acre south node, centered at SR-9 and 180<sup>th</sup> Street.

About 18 months later, Snohomish County amended its comprehensive plan (CP) and zoning maps to expand the northern of the two Type 1 LAMIRDs, adding 6.5 acres to its southern boundary. 1000 Friends of Washington challenged the action, alleging that, once designated, a LAMIRD may not be expanded, that the expansion does not comply with LAMIRD designation provisions, and that expansion would inappropriately convert rural land.

***Board's Decision***

The Board first considered whether an existing Type 1 LAMIRD may be expanded. A Type 1 LAMIRD allows infill, development, or redevelopment of commercial, industrial, residential, or mixed-use areas existing on July 1, 1990, in counties originally required to plan under GMA.

Although a LAMIRD designation must be limited to areas and uses existing on July 1, 1990, the Board found no authority in statute to prohibit the potential expansion of a Type 1 LAMIRD, provided the expanded boundary met the requirements of the GMA.

The Board then turned to the question of whether the new logical outer boundary met the requirements of the GMA. In considering the specific expansion, the Board looked to the existing uses of the three parcels added to the northern LAMIRD, as of July 1, 1990.

Relying on the findings of the Snohomish County Council for the existing uses, it noted that all three business uses were allowed commercial uses within the rural zone. The uses on the parcels did not, therefore, constitute “more intense rural development,” under the county’s zoning plan. Because the statute does not define “more intense” development, the Board used the county’s zoning code to determine if the uses were more intense than what is normally considered rural. Also, the Board found that the added parcels did not correct a flaw in the logical outer boundary of the LAMIRD.

Reasoning that expansion of the LAMIRD would allow sprawl in the form of commercial strip development along SR-9, the Board also made a determination of invalidity. Although 1000 Friends did not seek invalidation in the Petition for Review, but raised it first at the Hearing on the Merits, the Board explained that it is a remedy available to the Board without request by a party.

***GMA Implications and Practice Tips***

Type 1 LAMIRDs may be expanded if the enlargement meets the LAMIRD criteria. The logical outer boundary must minimize and contain existing uses that are “more intensive rural development.”

Because the Act does not define what constitutes “more intensive rural development,” that judgment is left for a county to determine. It will typically mean more intensive than what would be allowed under rural zoning. One of the purposes of

establishing a LAMIRD is to recognize existing clusters of more intense development in rural areas and reduce the number of nonconforming lots and uses in rural areas.

The purpose of establishing a logical outer boundary is to contain the LAMIRD and to prevent sprawl. One of the patterns of development that defines sprawl is strip commercial development. Logical outer boundaries that extend as a ribbon of commercial development along a highway should be avoided.