

**To: Robert Johnson, Director**

**From: Glenn Carter**

**Date: May 16, 2012**

**Re: Staff Recommendation on Compliance, *Nilson, et al. v. Lewis County*  
Growth Board Case No. 11-2-0003**

## **I. EXECUTIVE SUMMARY**

1. In its Final Decision and Order (“FDO”) in *Nilson, et.al. v Lewis County* (Case No. 11-2-0003)(copy attached as Exhibit F), the Washington Growth Management Hearings Board, Western Region (“Growth Board”), found that Lewis County’s interpretation of the “5,000 contiguous acres” clause in LCC 17.30.430(2) was consistent with and implemented the Comprehensive Plan (FDO, Ex. F, at 20 of 38), but that the application of that interpretation to Forecastle’s “opt-in” request resulted in “mapping inconsistencies” in the Land Use and zoning map to the extent that the Forecastle property was classified Forest Resource Land of Local Importance (FRLLI) but “similarly-situated lands” retained their classification as Forest Resource Land of Long Term Commercial Significance (FRLTCS) under LCC 17.30.430. (Id., see also FDO, Ex. F, at 7, 15 and 24 of 38.) The Growth Board ordered the County to resolve these inconsistencies.
2. In the compliance process, the County Staff has learned:
  - (1) That the 1996 ordinance creating the FRLTCS and FRLLI classifications (Ordinance 1151, Exhibit E) permitted the County to classify designated FRL solely as FRLTCS, but permitted the County to classify land as FRLLI if the landowner affirmatively applied to “opt in” to the FRLLI classification and otherwise met the criteria; and
  - (2) That the County received a number of applications in 1996 and 1997 to opt-in to FRLLI and some of those applications were granted (Resolutions, Exhibit A; List of Parcels, Exhibit C), but due to a mapping error the 2000 Land Use and Zoning Map failed to distinguish those FRLLI classifications and included them within the FRLTCS classification.
3. Staff proposes (1) to correct the County Zoning Map (proposed Zoning Map, Exhibit B) and reflect the 1996-97 FRLLI classifications of parcels erroneously identified on the current Zoning Map as FRLTCS, and (2) to revise the Lewis County Comprehensive Plan Land Use Map to reflect designated FRL without distinguishing between FRLTCS and FRLLI (revised Land Use Map, Exhibit D).
4. This compliance proposal will ***not*** result in a reduction of FRL in the County.

## II. APPLICABLE COMPREHENSIVE PLAN PROVISIONS AND REGULATIONS

1. The County's forestland classification criteria are set forth in the *County Comprehensive Plan Land Use Element* at page 4-56.

Forestlands are classified as follows:

- A. **Forestlands of Long Term Commercial Significance:** A predominance of forest land graded 2 and forest land graded 3 with ***a minimum block size of 5,000 contiguous acres shall be required for designation as forest land of long-term commercial significance.*** In addition, all federally owned lands managed for their forest resources are included.
- B. **Forestlands of Local Importance:** Are ***forestlands*** with the general attributes of Forestlands of Long-Term Commercial Significance, except that they are ***smaller than the required minimum 5,000 contiguous acres.*** Forestlands of Local Importance are only designated by an "Opt In" process and must generally be a minimum of 20 acres to be considered. Landowners petitioning to opt in must commit that the property will remain in that designation for a minimum of 10 years.

LCC 17.30.420 specifies the criteria for classification, as follows:

### **17.30.420 Classification.**

Long-term commercially significant forest resource lands of Lewis County are classified according to the following:

- (1) Private Forest Land Grades of the Washington State Department of Revenue (WAC 458-40-530).

- (a) The land grade system incorporates consideration of growing capacity, productivity, and soil composition of the land. Forest land of long-term commercial significance will generally have a predominance of the higher private forest land grades. However, the presence of lower private forest land grades within the areas of predominantly higher grades need not preclude designation of forest land.

- (b) The Washington State Department of Community, Trade and Economic Development also recommends that each county determine which land grades constitute forest land of long-term commercial significance, based on local and regional physical, biological, economic, and land use considerations.

....

- (e) A predominance of Forest Land Grade 2 and Forest Land Grade 3 shall be required for designation as forest land of long-term commercial significance.

- (2) Minimum Block Size. A minimum block size of 5,000 contiguous acres managed as forest lands. These blocks consist of predominantly large parcels and which can be in multiple ownerships.

- (3) Property Tax Classification. Property in the block is assessed or eligible to be assessed as open space or forest land pursuant to Chapter 84.33 or 84.34 RCW.

(4) Availability of Public Services Conducive to the Conversion of Forest Land. The property is located outside a designated urban growth area (UGA).

(5) Proximity of Forest Land to Urban and Suburban Areas and Rural Settlements. Forest lands of long-term commercial significance shall be located outside the urban and suburban areas and rural settlements. In addition to being located outside the UGAs, long-term forest lands should be far enough from urban areas that land use conflicts are minimized.

(6) Local Economic Conditions Which Affect the Ability to Manage Timber Lands for Long-Term Commercial Production. Economic conditions should be conducive to long-term timber management. In Lewis County, unfavorable economic conditions include locations with high administrative costs due to complaints from nearby landowners, locations requiring extensive security control efforts, and locations in which allowable forest practices such as burning and chemical applications will significantly interfere with other permitted land uses. Favorable economic conditions include Land Grade 2 and Land Grade 3 forest soils, which provide (in conjunction with large parcel sizes) the growth potential to manage timber lands for long-term commercial production.

(7) History of Land Development Permits Issued Nearby. For Lewis County, this means that recent residential development is an indicator of a pattern or direction of growth that may be encroaching on the forest land. The above criteria are applied throughout unincorporated Lewis County to designate those forest lands of long-term commercial significance. Those lands that currently meet the criteria are shown on map entitled Lewis County Forest Lands, March 1996. [Ord. 1197 §2, 2007; Ord. 1170B, 2000; Ord. 1157, 1998; Ord. 1151 § 4.1, 1996]

The forestland designations process is defined at LCC 17.30.430(1)-(2), as follows:

**17.30.430 Designation.**

Lands of Lewis County meeting the classification criteria for forest resource lands are hereby designated as forest resource lands in the following categories:

(1) **Forest Land of Long-Term Commercial Significance.** Primary forest lands are *those forest lands* meeting the classification criteria *within the minimum blocks of 5,000 contiguous acres* and all federally owned lands managed for their forest resources.

(2) **Forest Land of Local Importance.** Forest lands of local importance are *those forest lands* meeting the criteria of LCC 17.30.420 (1), (3), (4), (6) and (7) *which fall outside a 5,000-contiguous-acre block* and meet the following criteria:

(a) Formal Designation (“Opt-In”). Forest lands of local importance shall only be designated by the board of county commissioners upon a petition for such designation by the landowner pursuant to the requirements of LCC 17.30.560 (2).

(b) Minimum Acreage. Forest lands of local importance shall have a minimum parcel size of 20 acres. However, smaller parcel sizes shall be permitted for designation upon a showing of profitability in the form of a report from a qualified forester to provide a factual basis for designation as a forest land of local importance.

**2. Both FRLTCS and FRLLI are FRL.** The Growth Board found that both FRLTCS and FRLLI are Forest Resource Land of Long Term Commercial Significance (FRL) for purposes of RCW 36.70A.170 of the Growth Management Act (GMA). (FDO, Ex. F, at 21- 22, and 24 of 38.)

**3. County could only classify designated FRL as FRLTCS at the outset of the GMA planning process.** While the current County Code provisions quoted above (and the original 1996 FRL Ordinance, Ordinance 1151, attached as Exhibit E) permitted classification of both FRLTCS and FRLLI, the County could only classify designated FRL as FRLTCS at the outset of the GMA process. FRLLI was an “opt-in” classification that could only be applied upon the affirmative request of the landowner. (Ordinance 1151, Ex. E; *see also* Order on Motions for Reconsideration, Ex. G, at 9 of 10.)

**4. The County repealed an “opt-out” provision of the original development regulations in 2002.** When enacted in 1996 Ordinance 1151 also permitted owners of FRL to “opt-out” of the classification, but this “opt out” feature was repealed in 2002 with passage of Lewis County Ordinance 1179. (FDO, Ex. F, at 22 of 38.)

### III. GROWTH BOARD’S DECISION AND REASONING

**1. The Staff and Growth Board assumed that, in 1996, the County had the choice of initially classifying the Forecastle property either as FRLTCS or as FRLLI.** The Staff and Growth Board erroneously assumed that, in 1996, the County considered the Forecastle property for classification both as FRLTCS and as FRLLI, but chose the FRLTCS classification because it allegedly deemed the property part of a “5,000-contiguous-acre” block of forest resource land. (FDO, Ex. F.)

**2. No error or change in circumstances since original classification.** Assuming therefore that the County had already considered and rejected the potential classification of the Forecastle property as FRLLI in 1996, the Staff and Board deemed a re-classification inappropriate unless the County could establish that the initial classification was in error or that circumstances had changed. Citing to the findings of the Planning Commission and comments of commissioners and others in the record, the Growth Board reasoned that “there was not a mistake made in the original designation of [Forecastle’s] forest land...” (Id. at 17 of 38) and that “the record is clear that circumstances on or near the Property had not changed since it was originally designated forest resource land (FRLTCS) in 1994...” (Id. at 19 of 38.)

**3. County’s “re-interpretation.”** Because the re-classification of the Forecastle property as FRLLI was not due to an error in the original classification or a change in circumstances, the Growth Board surmised that the BOCC must have “re-interpreted” the meaning of “5,000 contiguous acres” in the Comprehensive Plan and LCC 17.30.420-.430 to mean something different from what the County understood the term to mean when the initial *choice* to classify the property as FRLTCS was made. (FDO, Ex. F, at 18 – 19 of 38.)

**4. Reinterpretation deemed consistent with and deemed to implement Plan.** The Growth Board expressly found that the BOCC's alleged "re-interpretation" of the 5,000-contiguous-acre clause was both consistent with and implemented the Comprehensive Plan:

Either interpretation of the challenged clause can be seen as consistent with and to implement the Comprehensive Plan classification criteria.

(FDO, Ex. F, at 20 of 38.) Nevertheless, the Board found that the application of the alleged re-interpretation created impermissible "inconsistencies" in the Land Use and Zoning Maps:

While, as stated, the Board is without jurisdiction to determine whether the BOCC's reinterpretation was or was not appropriate under the law, it does have jurisdiction to address potential inconsistencies resulting from that interpretation ....

Petitioners argue those properties, as well as others, would properly be shown and zoned FLLI under the new interpretation. The Board agrees with Petitioners' assertion. That fact results in an inconsistent Comprehensive Plan Land Use Map and an inconsistent zoning map, in violation of RCW 36.70A.070 (preamble) and RCW 36.70A.130(1)(d). There are similarly situated properties designated and zoned differently on both the Comprehensive Plan Land Use Map and the zoning map.

(Id. at 20 of 38.)

**5. Re-interpretation results in mapping inconsistencies.** The "inconsistencies" consisted of similarly-situated properties being classified differently in the County Land Use and Zoning Maps. (FDO, Ex. F, at 20 of 38.) The Growth Board concluded that such inconsistencies should not exist and must be remedied in this compliance proceeding. (Id.)

#### **IV. PROCEDURAL POSTURE OF APPEAL**

Lewis County and Forecastle have appealed the Growth Board's FDO and Order on Motions for Reconsideration to the Thurston County Superior Court, which will hear arguments on May 25, 2012. The Compliance Report in this matter is due to the Growth Board on June 14, 2012.

#### **V. GROWTH BOARD COMPLIANCE ORDER**

The GMA, as interpreted by the Growth Board, requires the County to comply with the Board's orders, notwithstanding the pending appeal. In the County's Motion for Reconsideration, the County asked the Board to clarify its ruling and articulate what types of compliance actions the County should consider. The Board's Order on Reconsideration articulates three possible compliance actions: (1) re-classification of similarly-situated properties, (2) amendment of LCC 17.30.420-.430, enacted in 1996, to justify classification of the Forecastle property without creating resulting inconsistencies, or (3) rescission of the Forecastle re-zone. (Order on Reconsideration, Ex. G, at 9 of 10.)

## **VI. FIRST STEP OF COMPLIANCE: CORRECT MAPPING ERROR**

1. **2000 Land Use and Zoning Maps.** In 2000, the BOCC codified the Forest Resource provisions of Ordinance 1151 (Ex. E) as LCC 17.30.430. At the same time, the BOCC adopted Comprehensive Plan Land Use and Zoning Maps showing all FRL in the County classified as FRLLTCS.

2. **The 2010 Re-Classification of the Forecastle Property.** In 2010, when the County classified the Forecastle property as FRLLI, and in 2011, when the County participated in the Growth Board hearing in this matter, Staff was not aware of the classification of any property in the County as FRLLI, with the exception of the Forecastle property. The current members of County Staff and the current Commissioners were employed by the County long after 1996, when the County first designated FRL.

3. **1996-97 Classifications of FRLLI.** Subsequent to the Growth Board's issuance of its FDO in 2011, Staff was informed by a county landowner that his family had petitioned for and been granted classification of its forest land as FRLLI in 1997. The landowner produced a copy of a BOCC resolution and ordinance accepting his family's opt-in petition under the provisions of Ordinance 1151 (Ex. E), now LCC 17.30.430(2), and classifying the land as FRLLI. By checking County records from around the same period, Staff subsequently uncovered other County legislative actions taken by the BOCC after the initial FRLLTCS classifications in 1996 approving opt-in applications for FRLLI zoning under LCC 17.30.430(2). Resolutions granting opt-in applications for lands erroneously identified as FRLLTCS on the County's 2000 and subsequent land use and zoning maps are attached hereto and incorporated herein as collective Exhibit A and incorporated herein by reference.

4. **Revised Zoning Map.** The current Zoning Map has been revised to correct the erroneous depiction of lands as FRLLTCS that in fact were classified as FRLLI in 1996-97 ("1996-97 Classifications"). The revised Zoning Map is attached hereto as Exhibit B and is incorporated herein by reference.

5. **List of 1996-97 Classifications.** Attached as Exhibit C and incorporated herein by reference is a list of the 1996-97 Classifications corrected on the revised Zoning Map, including parcel number and parcel size.

6. **The 1996-97 Classifications Comport with the Comprehensive Plan and Regulations.** Since discovering the mapping error a few months ago, Staff has reviewed the 1996-97 Classifications and has determined that they are consistent with the Comprehensive Plan, development regulations, and FDO. Staff therefore recommends that the Zoning Map be corrected to depict as FRLLI the lands that were erroneously depicted in the 2000 Zoning Map and subsequent iterations as FRLLTCS.

7. **Recognition of the 1996-97 Classifications Does Not Diminish the County's FRL.** Correction of this mapping error does not decrease, diminish or alter in any way the total FRL acreage in Lewis County.

8. **Revision of Land Use Map to Uniformly Depict FRL.** The FDO points out inconsistencies in the Comprehensive Plan Land Use Map/Forest Resource Lands/Figures 4.19(a) through (c). Among

other measures taken to eliminate those inconsistencies and to avoid unnecessary amendments to the Comprehensive Plan in the future, the County has prepared a proposed Land Use Map/Forest Resource Lands/Figures 4.19 (a) through (c) to substitute for the current Land Use Map/Forest Resource Lands/Figures 4.19(a) through (c). The revised map does not distinguish between FRLLI and FRLTCS. As the Growth Board specifically found that both classifications are FRL for GMA purposes, there is no need for the Land Use Map to distinguish between them. The new Comprehensive Plan Land Use Map/Forest Resource Lands/Figures 4.19(a) through (c), is attached hereto as Exhibit D and is incorporated by reference. All FRL is depicted as FRL, including the Forecastle property.

## VII. SECOND STEP OF COMPLIANCE: REVIEW FORECASTLE CLASSIFICATION

1. **Overview.** The correction of the 2000 mapping error addresses the apparent inconsistency of having small (less than 5000 acres) islands of FRL on the un-amended Land Use Map classified as FRLTCS. However, it does not address all of the Growth Board's concerns. The Growth Board found an inconsistency in classifying the Forecastle property as FRLLI and not classifying as FRLLI other similarly-sized and similarly-circumscribed (by railroads, highways, rivers and creeks, etc.) properties adjoining or abutting large blocks (5000 acres or more) of FRLTCS.

2. **Applicable Comprehensive Plan Provisions and Development Regulations.** Subsections 1 and 2 of LCC 17.30.430 use the terms "minimum blocks" and "5,000-contiguous-acre block" as follows:

(1) Forest Land of Long-Term Commercial Significance. Primary forest lands are those forest lands meeting the classification criteria ***within the minimum blocks of 5,000 contiguous acres*** and all federally owned lands managed for their forest resources.

(2) Forest Land of Local Importance. Forest lands of local importance are those forest lands meeting the criteria of LCC 17.30.420 (1), (3), (4), (6) and (7) ***which fall outside a 5,000-contiguous-acre block*** and meet the following criteria.... (Italics added.)

Similarly, LCC 17.30.420(2) uses the same terms, as follows:

(2) ***Minimum Block Size. A minimum block size of 5,000 contiguous acres managed as forest lands.*** These blocks consist of predominantly large parcels and which can be in multiple ownerships. (Italics added.)

3. **Interpretation of minimum blocks of 5,000 contiguous acres.** The Growth Board reasoned that all lands classified as FRLTCS are blocks of at least 5000 "contiguous" acres. Under an alleged "original understanding," the Board erroneously assumed all FRLTCS is "contiguous."

4. **Not all FRLTCS must be contiguous.** The regulations require only a core of 5,000 contiguous acres of FRL to support classification of land as FRLTCS. LCC 17.30.430(2) provides that forest lands that "fall outside a ***5,000-contiguous-acre block*** and meet the [classification] criteria...." are eligible for classification as FRLLI if the landowner "opts-in." LCC 17.30.430(1) and (2)(emphasis added). Hence, land that was not "contiguous" to a core block of a minimum of 5000 contiguous acres may have been considered and could have been included in the classification of the entire area as FRLTCS. In

such a case, the landowner retained the option of subsequently applying to “opt-in” to the FRLLI classification if the property “[fell] outside a 5,000 contiguous acre block and [met] the [classification] criteria...” Of course, any landowner of FRLTCS or FRLLI also retained the right to request a change in the designation or classification due to a change in circumstances or an error.

**5. The BOCC found that the Forecastle property “[fell] outside a 5,000-contiguous-acre block.”**

The Forecastle property “[fell] outside a 5000-contiguous acre block” of FRLTCS lying to the east that justified the initial classification of the *entire area* as FRLTCS in 1996. The Forecastle property was separated from that 5,000-contiguous-acre block by rights-of-way and/or water bodies. Hence, the Forecastle property was eligible for classification as FRLLI because it was neither *contiguous* to nor part of the block of at least 5000-contiguous-acres of FRLTCS that justified the FRLTCS classification of the entire area in 1996.

**6. Similarly-situated lands exist and may be classified FRLLI upon request.** There may be other properties classified as FRLTCS that “fall outside a 5000-contiguous-acre block and meet the [classification] criteria [for FRLLI],” provided the landowner applies to opt-in.

**7. The mere existence of FRLLI-eligible lands does not create an impermissible inconsistency.** The Code provision granting landowners discretion to opt-in has existed since Ordinance 1151 (Ex. E) was enacted in 1996 and was codified as LCC 17.30.430 in 2000. The regulation is final, is therefore deemed consistent with the Comprehensive Plan and compliant with the GMA, and cannot be collaterally attacked.

**8. The County’s interpretation preserves all FRL.** The County’s interpretation maintains the current amount of FRL in the County.

**9. Clarification of contiguous.** To minimize the potential for inconsistency in the future, it is appropriate to clarify the meaning of contiguous, one of the criteria applied in the classification of forest resource land of local importance. The definition of contiguous is added to the forest resource land section of the County Code as follows:

**17.30.115 Contiguous.**

“Contiguous” for purposes of this Chapter means land adjoining or touching by common corner or otherwise. Land divided by improved public rights-of-way or railroad rights-of-way or bodies of water subject to the Shoreline Management Act shall not be considered to be contiguous. County boundaries shall have no effect with respect to the application of this definition to the minimum block size of contiguous forest resource lands.

“Improved public rights-of-way,” “railroad rights-of-way,” and “bodies of water subject to the Shoreline Management Act,” are terms frequently used in land use transactions, litigation and regulations. These terms minimize the possibility of inconsistency in the application of LCC 17.30.420-430 in the future.

## VIII. PROPOSED FINDINGS AND CONCLUSIONS

1. The Lewis County Comprehensive Plan and LCC 17.30.420-.430 prohibit the classification of forest land as FRLTCS unless it is part of a large area with a core of 5000 contiguous acres of FRLTCS. (See Comprehensive Plan Land Use Element, at 4-56; LCC 17.30.430.)
2. However, the classification of such an area as FRLTCS does not mean that all of the classified land must be contiguous. The Growth Board erroneously assumed that all FRLTCS must be contiguous.
3. Adjoining or associated with the core of 5000 contiguous acres of FRLTCS there may be other lands that are classified as FRLTCS because of their proximity to the core, but without being deemed “contiguous” to the core for purposes of LCC 17.30.430.
4. The Forecastle property adjoins a large area of FRLTCS to the east that includes a core of 5,000 contiguous acres of FRLTCS.
5. Although the Forecastle lands and lands to the east were originally classified as FRLTCS, there is no evidence of a determination that the Forecastle land was deemed part of the core of 5,000 contiguous acres.
6. Staff and the Growth Board erroneously assumed in 2010 that the County could have made initial classifications of FRLI.
7. In fact, the County was empowered to initially classify designated FRL solely as FRLTCS. See LCC 17.30.430(2). Hence, the initial classification of the Forecastle property as FRLTCS did not include a determination that the FRLI classification did not apply.
8. After designated FRL was initially classified by the County as FRLTCS, the Plan and regulations permitted landowners to affirmatively request to “opt-in” to FRLI for eligible lands which “fall outside a 5000-contiguous-acre block...”
9. In 1996 and 1997, some landowners requested to opt-in to the FRLI classification and the BOCC, after hearings before the Planning Commission and BOCC, granted the applications.
10. Staff has reviewed the 1996-97 Classifications erroneously depicted on the 2000 Land Use and Zoning Maps as FRLTCS and affirmed that the mapping error should be corrected and those lands depicted on a revised Zoning Map as FRLI. (See Exhibit B.)
11. In the case of Forecastle property, Staff also has reviewed the classification of that property as FRLI and concludes that the classification is proper and is consistent with the Plan and development regulations. The Forecastle property is forest resource land “which falls outside a 5000-contiguous-acre block” of FRLTCS and meets the criteria set forth in LCC 17.30.420-.430 for classification as FRLI.
12. Staff has reviewed the County Zoning Map and determined that there may be other areas in the County that “fall outside of” a 5000-contiguous-acre-block of FRLTCS and are eligible for classification as FRLI, provided the landowner requests to “opt-in.”
13. As for those areas, the landowners have not yet requested to opt-in.

- 14.** Because of the express provision in LCC 17.30.430(2) preserving the owner's choice to opt-in to FRLLI, the owner's decision not to apply to opt-in is consistent with the development regulation and does not result in an impermissible inconsistency.
- 15.** However, in order to minimize inconsistencies and unnecessary amendments to the Comprehensive Plan, Staff recommends that the Comprehensive Plan Land Use Map/Forest Resource Lands/Figures 4.19(a) through (c) be amended so as not to distinguish between the two classifications of Forest Resource Land designated under RCW 36.70A.170, FRLLTCS and FRLLI. (See Exhibit D.) The County Zoning Map will continue to distinguish between FRL classified as FRLTCS and FRLLI. (See Exhibit B.)
- 16.** Further, to clarify the meaning of the term "contiguous" as used in LCC 17.30.420-.430 and to minimize the possibility of inconsistency in future re-classifications, Staff recommends adopting the following clarifying definition of the term "contiguous" as LCC 17.30.115:

"Contiguous" for purposes of this Chapter means land adjoining or touching by common corner or otherwise. Land divided by improved public rights-of-way or railroad rights-of-way or bodies of water subject to the Shoreline Management Act shall not be considered to be contiguous.