

**BEFORE THE WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD**

MICHAEL DURLAND, et al.,

Petitioners,

v.

SAN JUAN COUNTY,

Respondent.

No. 00-2-0062c

**COMPLIANCE  
ORDER/EXTENSION  
OF TIME**

FRED R. KLEIN,

Petitioner,

v.

SAN JUAN COUNTY,

Respondent.

No. 02-2-0008

**COMPLIANCE  
ORDER/EXTENSION  
OF TIME**

**I. SYNOPSIS OF THE CASE**

This matter comes to us upon the declaration of San Juan County that the Orcas Island Airport (OIA) Safety Zones are now in compliance. In this order, we find that the County has sufficiently analyzed the risk factors and conditions specific to the OIA and reduced development potential in those airport safety zones that carry the greatest risk. Important to our findings in this regard is the fact that the Washington Department of Transportation, Aviation Division, supports the County in its choice of methods for protecting the OIA from incompatible uses. For these reasons, we find the Airport Overlay Zone in compliance.

This matter also comes to us on the motion of San Juan County for an extension of time to complete the rest of the remand work required by our October 15, 2002 order pertaining to designating urban growth areas (UGAs) on Lopez Island and at Eastsound. Some essential components needed for capital facilities planning in both the Lopez and Eastsound UGAs have been completed. These components include the Eastsound Water and Sewer District's sewage general plan, the County's adoption of the *Lopez Village Water Supply Report and Recommendations and Abbreviated Coordinated Water System Plan*, a traffic circulation analysis for the Lopez UGA, and hiring a consultant to prepare revisions to the Lopez sewer capital facilities report.

We understand that developing a capital facilities plan is a complex and difficult task for a small rural county with limited resources. However, we are concerned that this is the second request by the County for an 180-day extension to complete its work, and substantial capital facilities planning still needs to be done. In this order, we give the County a 60-day extension of time to develop a work plan. This work plan should outline the tasks to be completed, identify the resources available for this work, and estimate the completion dates for its remaining remand work. The amount of time that the Board may grant as an extension to complete the work required in our compliance order of October 15, 2002 will be based on the work plan the County submits.

## **II. PROCEDURAL HISTORY**

In 2002, *Fred Klein v. San Juan County*, Case No. 02-2-0008 was first heard with Cases 99-2-0010c and 00-2-0062c. The compliance order that was issued on October 15, 2002 in these cases directed the County to do the following:

1. Complete final growth boundary lines in the Lopez UGA after studies on water availability and saltwater intrusion are concluded.
2. Complete a Lopez UGA capital facilities plan.

3. Complete an Eastsound UGA capital facilities analysis with respect to wastewater and drainage services.
4. Reconsider the Eastsound market factor.
5. Reconsider the inclusion of the westernmost, low-density properties in the Eastsound UGA and establish appropriate urban densities for a non-municipal UGA.
6. Reconsider incompatible uses in the Airport Overlay Zone.
7. Provide a report on its progress toward compliance no later than April 2, 2003.

The Board consolidated these three cases, Case No. 99-2-0010c, Case No. 00-2-0062c, and Case No. 03-2-0003, into one case, Case No. 03-2-0003c, on February 28, 2003.

On April 2, 2003, we received a motion from the County for a 180-day extension of time to complete the remand work regarding the Lopez and Eastsound Urban Growth Areas and for reconsidering incompatible uses in the Airport Overlay Zone for Orcas Island Airport. We received objections from Joanne Smith and Fred Ellis to this time extension. After considering the County's motion and the Petitioner objections, we granted a 180-day extension. On October 15, 2003, we received a motion from the County for another 180-day extension of time to complete remaining work for designating urban growth areas on Lopez Island and Eastsound. We also received a declaration from the County that by the passage of Ordinance 2-2003, it was now in compliance in regard to protecting the Orcas Island (Eastsound) Airport from incompatible uses.

Because of the large number of participants in this case and because the issues in this case are on two different compliance schedules, the Board divided the consolidated case of WWGMHB Case No. 03-2-0003c into three cases on

October 7, 2003. The issues involving ADUs will continue to be heard in Case No. 03-2-0003, *Friends of the San Juan, Lynn Bahrych and Joe Symons v. San Juan County*. The remaining issues being heard now in original cases WWGMHB Case No. 02-2-62c and WWGMHB Case No. 02-2-0008, are the subject of this compliance order.

On December 3, 2003, the Board held a telephonic compliance/motions hearing. Petitioner Fred Klein argued that the OIA's safety zones were still noncompliant. Petitioners Joanne Smith, Fred Ellis, and Fred Klein argued against giving the County a time extension to complete work necessary for compliant UGAs on Lopez Island and at Eastsound. Petitioner John Campbell attended, favored the extension, but did not speak. Deputy Prosecutor Alan Marriner represented the County. All three Board members attended.

### **III. STANDARD OF REVIEW, PRESUMPTION OF VALIDITY, BURDEN OF PROOF**

As we review the ordinance affecting the uses allowed in the Airport Safety Zones, we must presume that ordinance amendments made in response to a finding of noncompliance are valid. RCW 36.70A.320. The burden is on petitioners to demonstrate that the action taken by San Juan County is not in compliance with the requirements of the Growth Management Act ("GMA" or "the Act" hereafter). RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we "shall find compliance unless [we] determine that the action by [San Juan County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." In order to find the County's action clearly erroneous, we must be "left with the firm and definite

conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 19, 201 (1993).

#### **IV. ORCAS ISLAND AIRPORT (OIA) SAFETY ZONES**

##### **Applicable Law**

RCW 36.70.547  
RCW 36.70A.510  
RCW 36.70A.110  
RCW 36.70A.3201

##### **Positions of the Parties**

The urban level uses that the revised ordinance still allows in airport zones 3 and 4 are challenged by Petitioner Klein. Petitioner Klein argues that the allowed urban level uses are not consistent with WSDOT’s guidelines for protecting airports from incompatible uses. Petitioner criticizes the County for using a risk assessment to justify urban level densities in airport safety zones, particularly when considering the actual accident history at the OIA. Petitioner contends that the best way to protect the airport is to reduce densities to the levels recommended by WSDOT’s guidelines and that these densities would still leave property owners with a reasonable use of their property.

Petitioner Klein also contends that these urban level uses constitute encroachment, which is a great threat to the long-term viability of the OIA. Petitioner argues that these urban level densities will increase the number of citizens living in airport safety zones who will, as a consequence, be opposed to the airport in the future because of its impacts and their perception of risk.

The County points out that the highest potential for accidents exists in Airport Safety Zones 1 and 5 and the county’s regulations do not allow residential uses in these zones except for accessory dwelling units in hangars. The County also states that it has

reduced the allowable densities in other zones with the highest potential risk due to proximity to the runway itself: (1) Zone 2 from 4 dwelling units per acre (DUA) to 1 DUA, (2) Inner Zone 3 and Zone 4 from 8 DUA to 4 DUA. Only in Outer Zone 3, which corresponds to the village core, do the densities remain at 8 DUA with a small portion on the edge of this zone remaining at 12 DUA. In total, the County has reduced the potential number of new residential units from 195 to 102. The County asserts that the technique that it has used for evaluating risk is a statistically valid method to analyze the risk to the revised and remaining densities in the safety zones. The County further argues that it used the technique that is recommended by WSDOT in its guidance document<sup>1</sup> for assisting counties and cities in protecting airports from incompatible uses. The County analyzed risk based on the specific conditions present at the OIA. The County relies on a letter from WSDOT that supports their approach to protecting the OIA from incompatible uses. The County also refers the Board to WSDOT's website that shows good examples for protecting airports from incompatible uses in cities or urban growth areas.

Petitioner calls into question the County's assertion that WSDOT's website shows comparable urban densities in the safety zones compared with those at the OIA. He points out that the jurisdictions being used for comparison either have not allowed these densities to continue or have very little area at urban density levels. He also asserts that when WSDOT wrote the letter to San Juan County, the agency did not know the County was responding to the Board's order concerning uses in airport safety zones.

## **Discussion**

On October 15, 2002, the Board found the residential densities adopted in OIA's Safety Zones 2, 3, and 4 were inconsistent with RCW 36.70.547. Therefore, we look

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<sup>1</sup> Washington Department of Transportation Aviation Division, *Airports and Compatible Land Use Planning, An Introduction for Decision Makers* (revised February, 1999).

closely at the densities in these zones as well as at how all the County's airport safety zone regulations protect the OIA to determine whether the ordinance creates provisions that are consistent with the statute. In Ordinance 2-2003, we learn that the County has substantially reduced the densities in Zone 2 to 1 DUA and has cut the number of dwelling units allowed per acre in half from 8 DUA to 4 DUA in Inner Zone 3 and Zone 4. The County has not reduced the densities in Outer Zone 3, which allows densities between 8 and 12 DUA, the highest densities in the airport safety zones. Ordinance 2-2003, Section 1. In total, the County has reduced the potential number of dwelling units in airport safety zones from 195 to 102. Exhibit 1 attached to the August 15, 2003 Progress Report at 6.

As part of their remand work, the County staff considered WSDOT's guidance document and then produced their own risk analysis of OIA's safety zones. This analysis is contained in a staff report<sup>2</sup> that analyzed the unique airport operations, noise abatement procedures, and terrain of the OIA. Based on these factors, the Planning Department determined that for OIA, the highest risk zones were Safety Zones 1, 2, and 5; the medium risk safety zones were the East Inner Zone 3 and Zone 4; and the lowest risk zones were East Outer Zone 3 and the West Inner and Outer Zones 3. While Ordinance 2-3003 allows densities in all of these zones higher than what WSDOT's guidance recommends for various safety zones<sup>3</sup>, the County did reduce densities in the safety zones that they determined posed the high and medium risk potential based on local conditions. Outer Zone 3, where densities were not reduced is a zone that has the least potential risk for future accidents according to the County's analysis. Exhibit 1 attached to the August 15, 2003 Progress Report at 6 and 25.

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<sup>2</sup> Mann, Patrick, "Airport Overlay Districts for Orcas Island (Eastsound) Airport (July 14, revised July 22, 2003).

<sup>3</sup> The County staff report points out that WSDOT's guidance is based on national statistics for general aviation airports.

Ordinance 2-2003 retains provisions previously adopted that follow WSDOT's recommendations. These provisions include limitations on heights, appropriate floor area ratios and open space requirements, which direct that open space be provided in a manner that shifts development away from the runway. They also include prohibitions on the storage of flammable or hazardous materials in all zones and special function land uses such as schools, hospitals, and day care centers from Zone 1 and Inner Zones 2 and 3. Ordinance 2-2003, Section 1.

We understand the dilemma that San Juan County faces when considering appropriate densities for OIA safety zones. These zones generally would require less than urban densities to provide safety to residents living near the airport and to protect the airport from encroachment. However, in San Juan County, these zones also correspond to one of the few areas where the County can provide for some urban densities that could reduce development pressure on San Juan County's rural areas. These zones already contain substantial existing development.

When we look at the examples that WSDOT provided on its website and that both the Petitioner and the County cite as support for their positions, we observe that where those airports have safety zones in urban areas, all allow urban densities in portions of these safety zones. Some of these jurisdictions continue to permit urban densities in urban areas near general aviation airports. Exhibit C.

To help us evaluate the County's risk analysis and its determination to allow urban densities in some of the airport safety zones, we turn to the assessment provided by WSDOT. In a July 17, 2003 letter, WSDOT said:

The Eastsound Planning Review Community, Planning Commission, San Juan County, and the public have done an exemplary job in providing zoning strategies that balance the need to protect the airport from adjacent

incompatible uses and promote a vibrant high quality community.

We are especially encouraged by the multiplicity and depth of risk assessment and comparison of alternatives contained within the staff report. Strategies, which include lowering the land use density, intensity patterns, and creating open space in potential high-risk zones will substantially reduce known risks and promote the public health.

....Other plan components recommend discouraging development within the centerline of the runway approach /departure areas, creating open space, limiting special function uses such as schools and implementing intensity thresholds for new development in high-risk areas. When implemented all of these strategies will promote the quality of life of Eastsound residents and implement sound planning consistent with RCW 36.70.547.

Exhibit 2.

Petitioner says that we should disregard this letter, in part because the agency did not know that the County's work was being done in response to a remand order from the Board. Whether the agency knew that a remand order was at issue is not important to our consideration of its opinion in this case. A statement in WSDOT Aviation Division publication, *Airports and Compatible Uses, Volume 1*, leads us to believe that if WSDOT had concerns, the agency would have stated them. The statement says:

The support provided by this program not only gives jurisdictions the ability to craft responsible land use practices, it provides jurisdictions with an additional risk management tool to protect themselves from liability incurred through decision-making based upon irrelevant criteria or anecdotal evidence.

The program typically states, when evidence warrants it, that it is the opinion of the Washington State Department of Transportation Aviation Division that a proposed

incompatible development would be in direct conflict with RCW 36.70A.510 and development adjacent to the airport would be clearly be an incompatible use. *Airports and Compatible Uses, Volume 1*(revised February 1999) at 32.

This statement indicates to us that if WSDOT Aviation Division had concerns about San Juan County's airport safety zone regulations, the division would have informed the County of their concerns. While WSDOT's guidance is not a rule or law, nor does this agency have approval authority for local governments' plans and regulations regarding general aviation airports, we do give substantial weight to the opinion it renders. The Aviation Division is an agency with expertise which has as part of its mission providing cities and counties with the best available information and assistance in developing plans and regulations to protect general aviation airports from incompatible uses. WSDOT Aviation Division, *Airports and Compatible Land Uses* (Revised February 1999) at 32.

**While the County could have weighed the goals and requirements of the GMA differently, it is not our role to determine the best course that the County could have taken. Our task is to determine whether the County's choices are compliant with the statute. We give substantial weight to the agency's assessment that the County has appropriately addressed safety concerns and incompatible uses. We also find that the County has appropriately balanced the safety concerns with the goals and requirements of the GMA for directing growth to urban growth areas. We find that the County's regulations are now consistent with RCW 36.70A.547 as required by RCW 36.70A.510.**

## V. MOTION FOR AN EXTENSION OF TIME

On October 15, 2003, we received a second request from San Juan County for an 180-day extension to complete work necessary to comply with the Board's October 15, 2002 order regarding UGAs on Lopez Island and at Eastsound. For the Lopez Island

UGA, the remand work consists of studies of water availability and saltwater intrusion and a capital facilities plan. For the Eastsound UGA, the remand work included a wastewater and drainage system capital facilities plan, reconsideration of the market factor, establishing appropriate urban densities, and reconsideration of the inclusion of the westernmost low-density properties.

### **Applicable Laws**

RCW 36.70A.110

RCW 36.70A.070(3)

RCW 36.70A.020(1), (2)

### **Positions of the Parties**

The County says that the following work has been done and shows progress towards complying with our remand order:

- Conducting a risk analysis and public process adoption new regulations for protecting the OIA by the County;
- Adopting the *Lopez Village Water Supply Report and Recommendations and Abbreviated Coordinated Water System Plan* that took two years to develop;
- Adopting the Eastsound Water and Sewer District's sewer system plan for Eastsound; and
- Hiring a consultant to finalize revisions to the Lopez Village sewer report; and
- Completing a traffic circulation analysis for Lopez Village.

The County explains that the water supply study assessed water capacity of existing systems and evaluated expansion ability. The County states the study shows that the Fisherman Bay Water Association has water rights and source capacity, but would need additional engineering if it were going to serve areas beyond the village core. The study also shows that currently water rights exceed the existing freshwater resources, so these rights would need to be reallocated if expanded service were to be provided through the water association.

The County outlines the work that still needs to be done. For the Lopez UGA, this work includes finalizing the water and sewer capital facilities plan. For the water plan, this includes the following:

- Using the Abbreviated Coordinated Water System Plan to help develop a water capital facilities plan for the Lopez UGA, including design of infrastructure for fire flow and interties.
- Establishing a Water System/ Users Association for making decisions in regard to the water system.
- Creating an adaptive management plan for monitoring and analyzing water use and capacity.
- Developing financing and future infrastructure improvement for the water system.

The County states that it is now formulating a draft scope of work for completion of a water system comprehensive plan for Lopez Village. A portion of this plan will be a water capital facilities plan for the Lopez UGA. County's Reply Brief at 11. The County also states that it has funding available to fund a water capital facilities plan and it is seeking other sources of funding. Declaration of Richard Rutz (November 20, 2003) at 3.

The County at argument pointed out to the Board that it had voluntarily imposed a moratorium in the Lopez UGA outside the village core. Urban development is permitted within the village core because urban services are available there.

For Eastsound, the County states that the Eastsound Sewer and Water District has completed a general sewage plan. The County states this plan along with previous consultant work provides the information needed to complete the sewer capital facilities plan for Eastsound. The staff is going to prepare the drainage capital

facilities plan. This capital facilities plan needs to be completed before the County can make decisions about the designation of the final boundary and appropriate urban densities for the Eastsound UGA. County Reply Brief at 11.

Petitioner Klein also believes that the County has not demonstrated a sufficiently timely effort to meet the requirements of the Board's order. Petitioner asks the Board to deny the extension or to grant only a limited extension for which the County should submit a work schedule for completing the Eastsound UGA planning. Petitioner Klein's Brief and Opposition to Extension of Time (November 7, 2003) at 5.

Petitioners Smith and Ellis contend that the County has barely met its obligations in regard to RCW 36.70A.070(3) and does not have staff or resources to complete the job. They assert that water rights allocated for Lopez Village already exceed the freshwater resources. They are especially concerned that the County will not be the actual provider of urban services and that RCW 36.70A 070 (3) requires the County to be the provider of these services. They express doubt that the County will be able to deliver urban services at reasonable rates. The alleged lack of public participation in the development of the Water Supply Report and Abbreviated Coordinated Water System Plan is of significant concern to these petitioners.

### **Discussion**

The record shows that the Eastsound Water and Sewer District has completed a general sewer plan. Exhibit A attached to the Declaration of Richard Rutz. The record also shows that the County has adopted the *Lopez Village Water Supply Report and Recommendations and Abbreviated Coordinated Water System Plan* and prepared a draft scope of work for a consultant to complete a water system plan for Lopez Village. The County has also completed a traffic circulation analysis for Lopez Village and has hired a consultant to make revisions to the sewer capital facilities

report for the Lopez Island UGA. Attachment to October 15, 2003 Progress Report and Exhibit C attached to the Declaration of Richard Rutz.

We recognize that our remand order requires a substantial amount of work. This work includes the effort needed to bring OIA's safety zones into compliance. The record demonstrates a thorough and detailed risk analysis on the County's part that was conducted along with the work needed to meet the planning requirements for the Lopez and Eastsound UGAs. We realize that capital facilities planning is a time consuming and complex task. Nevertheless, when the County chose to establish UGAs at Lopez Village and Eastsound among several options afforded to it by the GMA, it incurred with this choice the added responsibility of developing a capital facilities plan for these UGAs to ensure that urban services to support urban densities can be provided to prevent sprawl and protect the environment. While the County has undertaken significant efforts to meet these requirements, a substantial amount of work remains before the County's designations of UGAs on Lopez Island and at Eastsound can be compliant. We are persuaded that the County is making real progress and has produced some of the essential components for the necessary capital facilities plans which suggest that successful completion of these plans is still a possibility. The County also has the opportunity to address the issues that have been raised by Petitioners Smith, Ellis, and Klein in the ongoing planning process.

The County's voluntary decision to impose a moratorium in the Lopez UGA helps allay our concern that environmental degradation could occur and sprawl be promoted while the County completes its capital facility planning for these UGAs. Our willingness to grant an extension is also dependent upon the same kind of environmental protection and sprawl preventing measures being put in place for Eastsound as capital facility planning continues for that UGA, as well.

**Therefore, we grant the County a 60-day extension to prepare a work plan for completing the remaining work for the Lopez and Eastsound UGAs as set out in the October 15, 2002 order in this case. This work plan shall include a list of the tasks that need to be completed, a timeline for completing those tasks, and identification of resources that will be devoted to completing the tasks. The work plan shall also include a description of the County's measures that ensure that the environment is being protected and sprawl is being prevented in the Eastsound UGA while the County completes capital facilities planning. This work plan is due February 18, 2004. Upon review of this work plan, the Board will determine the appropriate time extension for the County to complete the work outlined in our October 15, 2002 order.**

## **VI. FINDINGS OF FACT**

1. The County analyzed the OIA's operations, noise abatement procedures, and terrain to analyze risk factors specific to OIA's Airport Safety Zones.
2. Ordinance 2-2003 reduces densities in Airport Safety Zones in areas where its risk analysis showed the most risk.
3. WSDOT has prepared *Airports and Compatible Uses, Volume 1* (revised February 1999) to assist counties and cities required to protect general aviation airports from incompatible uses.
4. The County considered the guidance in *Airports and Compatible Uses, Volume 1* (revised February 1999) in designing its development regulations for the OIA airport safety zones.
5. Ordinance 2-2003 retains previous provisions in the OIA's Airport Safety Zones that protect citizens from airport operations by establishing height limitations and floor area ratios, providing and designing for open space to direct development away from the runway, prohibiting the storing of flammable material and hazardous waste in all airport safety zones, and barring

special function land uses such as schools and hospitals in Zone 1 and Inner Zones 2 and 3. These provisions are consistent with WSDOT's guidance.

6. A July 17, 2003 letter from WSDOT, Aviation Division complimented the County on the thoroughness and depth of the County's risk assessment.
7. WSDOT's July 17, 2003 letter said that the County had done an exemplary job in providing zoning strategies that balance the need to protect the airport from adjacent incompatible uses and promote a vibrant high quality community.
8. The Eastsound Water and Sewer District has completed a sewer system plan.
9. The County has completed *Lopez Village Water Supply Report and Recommendations and Abbreviated Coordinated Water System Plan*.
10. The County has contracted with a consultant to do prepare final revisions to sewer capital facilities report for Lopez Village.
11. The County has hired a consultant to finalize the Lopez Village sewer capital facilities report.
12. The County has completed a traffic circulation analysis for Lopez Village.
13. The County has voluntarily imposed a moratorium on development in areas of the Lopez UGA where urban services are not available.

## **VII. CONCLUSIONS OF LAW**

1. Ordinance 2-2003 brings the Airport Safety Zones for Orcas Island (Eastsound) Airport into compliance.
2. San Juan County has made sufficient progress on components needed for its capital facilities plan to merit consideration of an extension of time to complete the capital facilities plans for UGAs on Lopez Island and at Eastsound.

## **VIII. ORDER**

**The County is hereby granted a 60-day extension of time in which to prepare a work plan to be submitted to the Board by February 18, 2004. This work plan**

**shall include a list of the tasks that need to be completed, a timeline for completing those tasks, and identification of resources that will be devoted to completing the tasks. The work plan shall also include a description of the County's measures that ensure that the environment is being protected and sprawl is being prevented in the Eastsound UGA while the County completes capital facilities planning in Eastsound.**

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

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

SO ORDERED this 19th day of December 2003.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Holly Gadbow, Board Member

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Nan Henriksen, Board Member

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Margery Hite, Board Member