

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

FRIENDS OF SAN JUANS, LYNN BAHRYCH and
JOE SYMONS

Petitioners,

v.

SAN JUAN COUNTY,

Respondent.

No. 03-2-0003

**ORDER FINDING
CONTINUED
NONCOMPLIANCE
AND INVALIDITY**

I. SUMMARY OF THE DECISION

This matter comes to us as a result of the Board's October 31, 2003 decision that granted San Juan County (County) a 180-day extension to comply with the Board's Corrected Final Decision and Order (April 17, 2003) while it pursued its appeal in Thurston County Superior Court. That order found the County's regulations that allowed free-standing accessory dwelling units (ADUs) in rural and resource lands were noncompliant and invalid. After the Board issued its October 31, 2003 order, a decision on the County's and Petitioners' appeals of this case was issued by the Thurston County Superior Court. The Court upheld the Board's holding on density requirements for free-standing ADUs in rural and resource lands, but not the Board's ruling on the ordinance's occupancy requirements and the location limitations for ADUs in resource lands. The County has appealed the superior court decision to the appellate court, but in the meantime has told the Board that the County is not accepting any permits for free-standing ADUs that do not conform with the Board's April 17, 2003 order as modified by the superior court decision.

This order does the following: (1) it finds the County regulations for free-standing ADUs in continuing noncompliance and invalidity; (2) it directs the County to take some sort of official action within 60 days of the date of this order that notifies the public that the County is abiding by the Board's decision and gives certainty that the County will continue to abide by the Board's order as they pursue their appeal; and (3)

it requires a compliance report from the County 180 days from the date of this order for the purpose of reporting to the Board on the status of its measures to enforce the Board's order and their appeal.

II. PROCEDURAL HISTORY (COMPLIANCE)

On April 17, 2003, the Board found that the County's regulations that allowed free-standing accessory dwelling units (ADUs) in rural and resource lands noncompliant and invalid. Corrected Final Decision and Order, April 17, 2003. Both the County and Petitioners appealed the decision, which was heard in Thurston County Superior Court.

On October 31, 2003, the Board granted the County an extension of time to achieve compliance because it was pursuing its appeal in a timely way and had stated in a signed declaration that it was not issuing any permits for free-standing ADUs in rural and resource lands that did not comport with the Board's decision.

On January 9, 2004, the Superior Court issued a decision that upheld the Board's decision on density requirements for free-standing ADUs in rural and resource lands. However, the Superior Court ruled that the occupants of ADUs in resource lands did not have to be limited to family members or farm workers as required by the Board's decision. The Court also upheld the ordinance's site limitations on ADUs.

On January 30, 2004, the County submitted a progress report to the Board. The report stated that the County has appealed the superior court's decision to the appellate court, and that the County is not accepting any applications for free-standing ADUs that do not conform with the Board's April 17, 2003 order as modified by the superior court.

The Board rescheduled the compliance hearing that had been scheduled for May 4, 2004 in the October 21, 2003 order to May 21, 2004. A telephonic conference hearing was held on May 21, 2004. Mr. Randall Gaylord, San Juan County Prosecuting

Attorney, represented San Juan County. Other county attendees at the hearing included the Honorable Darcie L. Nielsen, the Honorable John Evans, and the Honorable Rhea Miller, County Commissioners; Ms. Debra "D. J." Sessner, Senior Planner 2, and Ms. Francine Shaw. Ms. Lynn Bahrych represented Petitioners. Other Petitioners present telephonically were Ms. Stephanie Buffum of Friends of San Juans and Mr. John Christopherson. Mr. Scott Rasmussen, a local news reporter, also attended. Board members Nan Henriksen and Holly Gadbow participated in the hearing.

After the compliance hearing the County held two mediation sessions with Petitioners. The County filed letter reports on these two sessions held on May 24 and June 10, 2004. Neither of these mediation sessions was successful in resolving the issues. The County requested in its letter that we use discretion and not issue an order until the appellate court had issued a decision.

III. ISSUE TO BE DISCUSSED

Does Ordinance 21-2002 as it amends sections of the County's code to allow for a freestanding ADU on single-family lots with a principal residence in rural lands and resource lands that allow for residential uses, without counting it as a unit of density for the purpose of calculating the underlying density, continue to be not compliant with RCW 36.70A.020(2) and RCW 36.70A.110(1)? Do the amended sections of this ordinance continue to substantially interfere with RCW 36.70A.020(2) and continue to be invalid according to RCW 36.70A.302(1)?

IV. DISCUSSION OF THE ISSUE

Applicable Laws
RCW 36.70A.300
RCW 36.70A.302
RCW 36.70A.330

Positions of the Parties

Mr. Gaylord stated that County is trying to achieve compliance through several avenues. First, the County appealed the superior court's decision to the court of appeals in a timely manner. Secondly, the County sought to have the legislature change the legislation regarding ADUs and was not successful in this endeavor during the last legislative session. The County intends to pursue legislation in this regard in the next legislative session. Finally, the County engaged a mediator and scheduled a mediation session with Petitioners for May 24, 2003. He stated that the County has not amended its ordinance to comply with the Board's order as modified by the superior court but that the County was abiding by the Board's order by not accepting applications for free-standing ADUs that do not conform with the Board's order (as modified by the superior court decision) and that this practice had been announced to the public.

In response to questions from the Board, Mr. Gaylord replied that he had not sought a stay from the court of appeals because he was not sure that the court of appeals had jurisdiction; he further stated that the process of amending an ordinance was costly and time consuming for the county staff (that had seen a major turnover) and had to deal with several complex remand issues. He pointed out one alternative the County could undertake while pursuing its appeal would be to issue an official administrative interpretation and publish it.

Mr. Gaylord stated that the County respected the Board's authority to have a compliance hearing and recommended that the Board schedule periodic reviews of progress towards compliance of this case pursuant to RCW 36.70A.330(5) while the County pursues its appeal.

Ms. Bahrych stated that Petitioners have not filed a cross appeal and have hired an attorney to defend the superior court decision. She said that when the superior court

upheld the Board's decision in regard to density requirements for free-standing ADUs, Petitioners had expected the County to modify the ordinance to be consistent with the Board's order as modified by the superior court; the County's ordinance still allows free-standing ADUs without regard to their impact on structural density. She said that the Petitioners had agreed to participate in mediation with the County.

Board Discussion

The Board respects the County's right to achieve compliance through judicial appeals and with the legislature. We also note that San Juan County has respected Board orders and filed compliance reports in a timely manner. Unfortunately, the parties have failed to resolve this issue through mediation.

As long as this case is in the Board's jurisdiction, the Board has the obligation to require compliance with its order pursuant to RCW 36.70A.330(2). In our April 17, 2003 Corrected Final Decision and Order, we found the County's regulations for free-standing ADUs in rural and resource lands noncompliant and invalid. Applications for such free-standing ADUs are now subject to RCW 36.70A.302(3). We also appreciate the County's assurances that they are not accepting permits for free-standing ADUs that do not comply with the Board's court-modified order and that it has announced this to the public.

Petitioners pointed out at the compliance hearing that the County ordinance still allows free-standing ADUs without regard to the impacts of those ADUs on structural density. The County's counsel acknowledges that the County has not amended its ordinance to comply with the Board's court-modified order, but stated that the County was honoring the spirit of the order. However, he suggested at the compliance hearing that the County could go beyond its current practice of directing staff to not accept applications for free-standing ADUs and issue an official County interpretation that as long as the Board's order (as modified by the court) is in effect no applications for

free-standing ADUs would be accepted and publish this official interpretation according to county rules regarding publication. Board Member Henriksen also suggested that other counties in the San Juan County situation achieved compliance by amending their ordinances to comply but also included language in their ordinances that the County's new provisions would no longer apply if a court reverses the Board. These are two ways that the County could ensure that the Board's order is being enforced while the County pursues its other legal remedies. There are certainly others. While we have no reason to doubt that the County would honor its statement that it is not accepting applications for free-standing ADUs, the County needs to assure its citizens, as well as the Board, that the County is complying with the Board's order and will continue to comply.

As long as the County has not taken action to comply with the Board's order, the only alternative we have is to find that the County's regulations for free-standing ADUs continue to be noncompliant and invalid. *See* RCW 36.70A.300(1). We also find that the County needs to take some type of published official action that assures the public that the County is complying with the Board's order. Additionally, while this case is in the Board's jurisdiction, the County will report to Board periodically on the status of its court appeal and the measures it is using to enforce the Board's order.

V. FINDINGS OF FACT

1. The Western Washington Growth Management Hearings Board's April 17, 2003 Corrected Final Decision and Order in this case found the County's regulations that allowed free-standing accessory dwelling units (ADUs) in rural and resource lands noncompliant and invalid.
2. The Western Washington Growth Management Hearings Board October 31, 2003 Order Granting An Extension granted the County an 180-day extension to pursue its appeal of our April 17, 2003 Corrected Final Decision and Order in this case.
3. On January 9, 2004, the Thurston County Superior Court upheld the Western Washington Growth Management Hearings Board's April 17, 2003 Corrected Final Decision and Order's decision in regard to density requirements for free-standing ADUs in rural and resource lands. The Court differed from the Board

by holding that the County did not need to limit occupancy of ADUs in resource lands to family members or resource workers and upholding the ordinance's site limitations provisions.

4. The County's January 30, 2004 compliance report acknowledges that the County has not amended its ordinance, states that the County was appealing the superior court decision to the court of appeals, and relates that the County is abiding by the spirit of the Board's decision as modified by the court order by not accepting applications for ADUs in rural and resource lands that did not conform with the density ruling in the Board's order.
5. Ordinance 21-2002 fails to comply with RCW 36.70A.020(2) and RCW 36.70A.110(1) and substantially interferes with the goals of RCW 36.70A.020(2) for the reasons set out in the Board's Corrected Decision and Order dated April 17, 2003.
6. The County has not amended its ordinance to comply with the Board's April 17, 2003 Corrected Final Decision and Order as modified by the Thurston County Superior Court.
7. The County has appealed the Thurston County Superior Court decision to the court of appeals.
8. The County has declared that it is not accepting applications for free-standing ADUs that do not comply with the Board's court-modified order.
9. ADUs in San Juan County are subject to RCW 36.70A.302(3)(a).

VI. CONCLUSION OF LAW

Because the County has not amended its regulations in regard to ADUs in rural and resource lands pursuant to the Board's April 17, 2003 Corrected Decision and Order as modified by the Thurston County Superior Court's January 9, 2004 Decision, we find the County's ADU regulations as they apply to rural and resource lands continue to be noncompliant and invalid.

VII. ORDER

The County shall within 60 days of this order take some type of published official action that assures the public and this Board that the County is complying and will continue to comply with this Board's order in this case as modified by the Thurston County Superior Court decision of January 9, 2004 and file it with the Board.

The County shall file a compliance report with the Board within 180 days of the date of this compliance order. The compliance report will report to the Board the progress of the County's appeal to the court of appeals and the manner in which the County is continuing to enforce this Board's order (as modified by the superior court).

Compliance Schedule

August 30, 2004	Deadline for taking official action ensuring compliance with the Board's order regarding free-standing ADUs in rural and resource lands as modified by the Thurston County Superior Court
December 28, 2004	Compliance Report due
January 10, 2005	Objections to a finding of compliance due
January 24, 2005	County's Response due
February 2, 2005	Compliance Hearing

This is a final decision pursuant to WAC 242-02-832 and RCW 36.70A.300(5) upon which review may be sought in accordance with Ch. 34.05 RCW.

SO ORDERED this 30th day of June 2004.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Holly Gadbaw, Board Member

Nan Henriksen, Board Member