

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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3
4 FRIENDS OF SAN JUANS, LYNN BAHRYCH and
5 JOE SYMONS,

No. 03-2-0003c

6
7 Petitioners,

8 v.

**COMPLIANCE
ORDER
(2005)**

9 San Juan County,

10 Respondent.
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14 I. SUMMARY OF THE DECISION

15 This matter comes to the Board in response to the Board's December 3, 2004, Order on
16 Issues for Reconsideration. That decision ordered the County to bring its regulations
17 regarding freestanding accessory dwelling units (ADUs) into compliance with the Growth
18 Management Act (GMA) in accordance with the Board's April 17, 2003, Corrected Final
19 Decision and Order as modified by the Thurston County Superior Court. After the superior
20 court affirmed the Board's decision in major part, the County appealed the final decision and
21 order to the court of appeals. That appeal has been argued and the County expects the
22 decision shortly. For that reason, the County chose not to amend its freestanding ADU
23 regulations until the appeals court issues its decision in this case. Instead, the County
24 passed Ordinance 3 - 2005 (Ordinance), an interim moratorium on accepting applications
25 for freestanding ADUs in rural and resource designations on lots of not less than 10 acres.
26 The Ordinance will expire September 12, 2005. The County states that it did not wish to
27 expend its limited staff resources on the full amendment to the County's development
28 regulations required by the Board's decision until the result of its appeal is known. The
29 interim measure was adopted to demonstrate to the Board that the County was complying
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1 with the spirit of the Board's order, but not for the purpose of achieving compliance or to
2 have invalidity lifted.

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4 Petitioners argue that the moratorium on accepting applications for ADUs in resource lands
5 does not meet the spirit of the Board's April 17, 2003, decision because it allows the County
6 to accept applications for ADUs on lots in resource lands that are not of sufficient size to
7 accommodate an ADU in addition to the primary residence. Furthermore, Petitioners
8 contend Section 3 of the interim Ordinance violates the Board's April 6, 2001, Order
9 Clarifying Invalidity, issued in the earlier case on the County's guest house ordinance, *Town*
10 *of Friday Harbor, Fred R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San Juan*
11 *County*, WWGMHB Case No. 99-2-0010c. Petitioners allege that the County's permitting of
12 principal residences on lots where a structure of 1000 square feet or less existed prior to the
13 Board's November 30, 2000, order is not consistent with the Board April 6, 2001, Order
14 Clarifying Invalidity.
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18 Here the Board finds that the County's freestanding ADU regulations continue to be
19 noncompliant because the County did not amend its development regulations as the
20 Board's December 3, 2004, order required, but only passed an interim measure. The Board
21 further finds that Ordinance 3 - 2005 does not remove substantial interference with the
22 goals and requirements of the GMA, nor does it meet the spirit of the Board's April 17, 2003,
23 decision as modified by the Thurston County Superior Court. The Ordinance allows the
24 County to accept applications for freestanding ADUs which would violate the underlying
25 density limitations on single-family dwelling units in resource lands. Finally, the Board finds
26 to the extent that Section 3 of the Ordinance expands the exception for principal residences
27 on lots with a structure of 1000 square feet or less beyond those applications to which the
28 vested rights doctrine applies, it does not comply with the Board's November 30, 2000, Final
29 Decision and Order, the April 6, 2001, Order Clarifying Invalidity (WWGMHB Case No. 99-2-
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1 0010c) and the April 17, 2003, Corrected Final Decision and Order (WWGMHB Case No.
2 03-2-0003c).

3 4 5 **II. PROCEDURAL HISTORY**

6 On November 30, 2000, the Board found that the provisions of the County's 2000
7 comprehensive plan amendments that allowed for new guest house construction in rural
8 and resources lands failed to comply with the GMA and were invalid because the analysis of
9 the impacts of detached accessory dwelling units (ADUs) continued to be inadequate.

10 *Town of Friday Harbor, Fred R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San*
11 *Juan County*, WWGMHB Case No. 99-2-0010c (Final Decision and Order, November 30,
12 2000).

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14
15 On April 6, 2001, the Board issued an order clarifying the application of its imposition of
16 invalidity in the November 30, 2000, Final Decision and Order. *Town of Friday Harbor, Fred*
17 *R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San Juan County*, WWGMHB Case
18 No. 99-2-0010c (Order Clarifying Invalidity, April 6, 2001). In that clarifying order the Board
19 said:

20 [w]e answer the County's question of whether the determination of invalidity also
21 prohibits the issuance of a building permit for the construction of a principle (sic)
22 residence if the property owners have previously constructed a guest house on the
23 property in the negative. However, the previously constructed or permit- vested
24 "guest house" must meet the definition of SCC 18.40.240. Otherwise the second
25 residence would fall within the determination of invalidity issued on November 30,
26 2000.

27 *Town of Friday Harbor, Fred R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San*
28 *Juan County*, WWGMHB Case No. 99-2-0010c, (Order Clarifying Invalidity, April 6, 2001)
29 at 3.

30 On December 3, 2002, after a consultant's analysis of ADUs was published and subject to
31 public review and comment, the County considered changes to its Uniform Development
32 Code and shoreline regulations regarding ADUs. After public hearings held by both the
Planning Commission and the Board of County Commissioners (BOCC) and a

1 recommendation from the Planning Commission, the BOCC adopted Ordinance 21-2002,
2 which amended the regulations for the construction of ADUs, and Resolution 120-2002,
3 which adopted monitoring of the construction of new ADUs. Notice of adoption of these
4 ordinances was published on December 11, 2002.
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6
7 On December 19, 2002, the Board received a motion from the County to rescind its findings
8 of invalidity for the construction of ADUs in rural and resource lands and find that the
9 recently adopted amendments to the UDC and the SMP regulating ADUs comply with the
10 GMA.
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12 On February 7, 2003, the Board received a Petition for Review from Friends of San Juans,
13 Lynn Bahrych, and Joe Symons challenging Ordinance 21-2002 on the basis of
14 amendments to the regulations for the construction of ADUs.
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17 On February 25, 2003, the Board received a stipulation from Friends of San Juan, Lynn
18 Bahrych, Joe Symons, and San Juan County in which the parties stipulated that issues
19 regarding ADUs raised in Petition 03-2-0003 had been heard at the Compliance Hearing on
20 February 18, 2003. The parties also stipulated: (1) that no additional briefing or argument
21 is needed for the Board to decide these issues in its compliance order to be issued in March
22 2003, and (2) that all of these issues will be decided in the March 2003 Order, subject to the
23 usual rights of appeal. The Petitioners and the County stipulated to a consolidation of Case
24 No. 03-2-0003 with Case Nos. 99-2-0010c and 00-2-0062c.
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26
27 In its final decision and order on the consolidated case, the Board found the County's
28 regulations that allowed freestanding accessory dwelling units (ADUs) in rural and resource
29 lands to be noncompliant and invalid. *Friends of San Juans, et al. v. San Juan County*,
30 WWGMHB Case No. 03-2-0003c (Corrected Final Decision and Order, April 17, 2003).
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1 Both the County and Petitioners appealed this decision, which was heard in Thurston
2 County Superior Court.

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4 On October 7, 2003, the Board divided the issues in the consolidated case, Friends of San
5 Juans v. San Juan County, WWGMHB Case No. 03-2-0003c, because the issues
6 consolidated in these cases were on two different compliance schedules. The issues
7 regarding ADUs remained in Case No. 03-2-0003c.¹ The issues regarding the designation
8 of urban growth areas (UGAs) for Lopez Village and Eastsound were kept in their original
9 case, *Michael Durland v. San Juan County*, WWGMHB Case No. 00-2-0062c. That case is
10 being heard with *Fred Klein v. San Juan County*, WWGMHB Case No. 02-2-0008.
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13 On October 31, 2003, the Board granted the County an extension of time to achieve
14 compliance because the County was pursuing its appeal in a timely way and had submitted
15 a signed declaration stating that it was not issuing any permits for freestanding ADUs in
16 rural and resource lands that did not comport with the Board's decision.
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19 On January 9, 2004, the Thurston County Superior Court issued a decision that upheld the
20 Board's decision on density requirements for freestanding ADUs in rural and resource
21 lands.²
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24 On January 30, 2004, the County submitted a progress report to the Board. The report
25 stated that the County has appealed the superior court decision and that the County is not
26 accepting any applications for freestanding ADUs that do not conform to the Board's April
27 17, 2003, decision as modified by the superior court decision.
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29
30 ¹ ADU issues were originally heard in *Town of Friday Harbor, Fred R. Klein, John M. Campbell, and Lynn*
Bahrych, et al. v. San Juan County, WWGMHB Case No. 99-2-0010c.

31 ² However, the superior court ruled that the occupants of ADUs in resource lands did not have to be limited to
32 family members or farm workers as required by the Board's decision and upheld the County's siting
requirements.

1 The Board rescheduled the compliance hearing that had been scheduled for May 4, 2004,
2 in the October 21, 2003, order to May 21, 2004. A telephonic hearing was held on May 21,
3 2004. After the compliance hearing, the County participated in two mediation sessions with
4 Petitioners. The County filed letter reports on these two sessions held on May 24 and
5 June 10, 2004. Neither of these mediation sessions was successful in resolving the issues.
6 The County requested in its June 21, 2004, letter that the Board exercise its discretion and
7 not issue an order until the appellate court issues its decision.
8

9
10 On June 30, 2004, the Board issued an order finding continuing noncompliance and
11 invalidity and ordering the County to take official action to comply with the Board's April 17,
12 2003, order and to notify the public of that action.
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15 On July 9, 2004, the Board received Petitioners' Motion for Clarification or Reconsideration.
16 Petitioners alleged that the County is permitting a second single-family residence on lots in
17 rural and resource lands that contain a single family dwelling unit of 1000 square feet or
18 less. Therefore, Petitioners asked the Board to:

19 (1) direct the County immediately to discontinue its policy of permitting a second
20 single-family dwelling unit on all lands with existing dwelling units smaller than 1000 square
21 feet, and
22

23 (2) direct the County to amend its ordinance within a specific time period to bring its
24 ordinances and policies into compliance with the GMA.
25

26 On July 24, 2004, the Board issued an order scheduling a telephonic hearing on Petitioners'
27 Motion for Clarification or Reconsideration. The County requested the hearing be in person
28 in San Juan County. On August 2, 2004, the Board postponed the August 6, 2004, hearing
29 and directed the County to submit a brief in response to Petitioners' motion. The County
30 submitted its response on August 11, 2004.
31
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1 A hearing was held on November 8, 2004, on Orcas Island. Lynn Bahrych represented
2 Petitioners and Randall Gaylord represented San Juan County. All three Board members
3 attended.

4
5 On December 3, 2004, the Board found that Ordinance 21-2002 had not been amended
6 and that the Board could no longer accept, pending resolution of the County's appeal to the
7 courts, the County's "practice" of not issuing building permits that did not conform to the
8 Board's order as interim compliance in lieu of amending its ordinance because now
9 Petitioners dispute whether the County in fact is complying with this order when issuing
10 building permits for ADUs. Order on Issues for Reconsideration (December 3, 2004).
11 Therefore, the Board found Ordinance 21-2002 in continuing noncompliance and invalidity
12 and ordered the County to bring that ordinance into compliance within 120 days. *Ibid.*
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16 The County adopted Ordinance 3 – 2005 on April 14, 2005, and submitted a compliance
17 report on April 18, 2005. Petitioners filed objections to a finding of compliance on May 5,
18 2005, and the County submitted a response to these objections on May 31, 2005.
19

20 The Board held a telephonic compliance hearing on July 9, 2005. Lynn Bahrych and David
21 Mann represented the Petitioners. Cameron Carter represented the County. Stephanie
22 Buffum attended for Friends of San Juan County. All three Board members attended.
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25 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF,**
26 **AND STANDARD OF REVIEW**
27

28 Comprehensive plans, development regulations, and amendments, thereto, adopted under
29 this chapter, are presumed valid upon adoption. RCW 36.70A.320(1).
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31 If there has been a finding of invalidity, under RCW 36.70A.320(4), the County has the
32 burden of showing that the ordinance or resolution it has enacted in response to the

1 determination of invalidity “will no longer substantially interfere with the fulfillment of the
2 goals of this chapter.” Once the County has shown that the legislative action no longer
3 substantially interferes with the fulfillment of the GMA goals, the burden shifts to the
4 Petitioners to demonstrate that the action taken by the County is not in compliance with the
5 requirements of the GMA. RCW 36.70A.320(2).
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7
8 Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that
9 the action by [San Juan County] is clearly erroneous in view of the entire record before the
10 board and in light of the goals and requirements of [the GMA].” In order to find the County’s
11 action clearly erroneous, we must be “left with the firm and definite conviction that a mistake
12 has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).
13

14 **IV. ISSUE TO BE DISCUSSED**

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16 ***Has the County brought its ordinance regarding freestanding ADUs in rural and***
17 ***resource lands into compliance with the GMA as set out in the Board’s order of***
18 ***April 17, 2003, as modified by Thurston County Superior Court?***
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20 **V. DISCUSSION OF THE ISSUE**

21 **A. Interim Ordinance**

22 **County’s Explanation**

23
24 The County explains that the appeal of the Thurston County Superior Court decision to the
25 Court of Appeals, Division II, has been heard and that the County expects a decision in
26 three to four months. At argument, the County stated that it passed Ordinance 3 – 2005 as
27 an interim measure, not to achieve compliance or to have invalidity lifted, but to demonstrate
28 to the Board that the County is abiding by the December 3, 2004, Order on Issues for
29 Reconsideration. That order required the County to bring its development regulations for
30 ADUs into compliance with the GMA as directed by the Board’s April 17, 2003, Corrected
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1 Final Decision and Order, as modified by the Thurston County Superior Court, while it
2 waited for the appeal court's decision.

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4 **Discussion**

5 The County's action does not comply with the December 3, 2004, Order on Issues for
6 Reconsideration in this case. The Ordinance and the County's Compliance Report state
7 that the Board's December 3, 2004, Order on Issues for Reconsideration ordered the
8 County to take "some sort of 'official' action." San Juan County's Compliance Report
9 (April 14, 2005) at 2 and Ordinance 3 – 2005 at 2. The Board was more specific:
10

11 The County must bring its ordinance regarding freestanding ADUs in rural and
12 resource lands into compliance with the Board's order of April 17, 2003, as modified
13 by Thurston County Superior Court, within 120 days of the date of this order.
14 Order on Issues for Reconsideration (December 3, 2004) at 6.

15 The Ordinance is interim in nature and does not amend the County's regulations regarding
16 freestanding ADUs in rural and resource designations, but establishes a moratorium for five
17 months on accepting applications for permits on lots of not less than 10 acres in certain
18 comprehensive plan land use designations including rural and resource lands.
19

20
21 Since the Board's December 3, 2004, Order on Issues for Reconsideration was entered, the
22 County has pursued its appeal in the Court of Appeals. The County expects a decision will
23 be issued in the near future. We understand the County's desire to obtain a final resolution
24 from the Court of Appeals before expending time and resources on amending its ordinance
25 with the necessary and appropriate public process. However, the interim measure adopted
26 by the County is not sufficient to bring the County's regulations into compliance with the
27 GMA.
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29
30 On prior occasions, this Board has said that compliance cannot be achieved through an
31 interim ordinance. In *Evergreen Islands v. Skagit County*, WWGMHB Case No. 00-2-0046c,
32 the Board said:

1 ...we cannot rule in this case until the County has adopted an interim ordinance. In a
2 prior decision in this case, the Board lifted invalidity, when the County adopted an
3 interim ordinance regarding the boundaries of the Big Lake Rural Village, but found
4 continuing noncompliance because the County had adopted the ordinance as
interim.

5 *Evergreen Islands v. Skagit County*, WWGMHB Case No. 00-2-0046c (Compliance Order,
6 June 23, 2004) at 10.

7 Also see *Evergreen Islands v. Skagit County*, WWGMHB Case No. 00-2-0046c (Order on
8 Motions, Reconsideration Requested Stay, and Additions to the Record, March 27, 2003)
9 and *Island County Citizens Growth Management Coalition v. Island County*, WWGMHB
10 Case No. 98-2-0023c (Compliance Order, April 2, 2001). The reason for this is that an
11 interim ordinance will, by its terms, expire in a set period of time. Once the interim
12 ordinance expires, the County will again be out of compliance. Given the statutory
13 limitations on the Board's jurisdiction, expiration of the interim ordinance would not confer
14 jurisdiction upon the Board to determine compliance and so the Board cannot determine
15 compliance until a permanent amendment has been adopted. See RCW 36.70A.290(2) on
16 the jurisdiction of the boards.
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19
20 **Conclusion:** Adoption of an interim ordinance cannot cure noncompliance. Further, the
21 Board finds that the interim ordinance does not remove substantial interference with the
22 fulfillment of the goals of the Act for the reasons discussed below. Therefore, the Board
23 finds that the County's regulations regarding freestanding ADUs in rural and resource lands
24 continue to be noncompliant and invalid.
25

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27 B. Application of Board's Order to Rural and Resource Lands

28 **Positions of the Parties**

29 The County states that its interim ordinance was not adopted or codified to achieve
30 compliance because the County is waiting for the appeals court decision before it expends
31 time and resources to bring its regulations regarding freestanding ADUs into compliance
32 with the GMA as directed by the Board. Nevertheless, the County has submitted this interim

1 ordinance to show that it is abiding by the Board's order in regard to freestanding ADUs in
2 rural and resource lands. Therefore, we will examine whether the interim ordinance
3 complies with the Board's order and the GMA.
4

5
6 At argument, Petitioners contended that Section 2 of the interim Ordinance does not comply
7 with the Board's order in *Friends of San Juans, et al. v. San Juan County*, Case No. 03-2-
8 0003c (Corrected Final Decision and Order, April 17, 2003) and RCW 36.70A.020 (8) and
9 RCW 36.70A.060(1). Section 2 of the Ordinance provides that the County will not accept
10 applications for permits for freestanding ADUS on lots of less than 10 acres in resource
11 lands. Petitioners assert that this violates the County's own density requirements for
12 resource lands. The density allowed in agricultural lands is one dwelling unit per 20 acres,
13 and in forest lands, the density is one unit per 40 acres. Petitioners maintain that a
14 freestanding ADU must comport with the resource lands designation's underlying density
15 limitations for single-family dwelling units.
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17
18 At the compliance hearing, the County conceded that this was an unintentional drafting
19 error. The County stated that this ordinance was hastily drafted to meet the Board's April 4,
20 2005, compliance deadline and that it is willing to correct this error.
21

22 **Discussion**

23
24 The Board's April 17, 2003, Corrected Final Decision and Order held the following in regard
25 to freestanding ADUs in resource lands:

26 We find that the County's decision to allow one freestanding accessory dwelling unit
27 on any parcel in agricultural and forest resource lands fails to conserve resource
28 lands and prevent interference with the conservation of the resource, and are not in
29 compliance with RCW 36.70A.020(8). We find this decision is clearly erroneous,
30 does not comply with RCW 36.70A.020(8) and substantially interferes with RCW
31 36.70A.020(8) pursuant to RCW 36.70A.302.

32 *Friends of San Juan County v. San Juan County*, WWGMHB Case No. 03-2-0003c
(Corrected Final Decision and Order, April 17, 2003) at 32.

1 The Thurston County Superior Court upheld the Board's ruling regarding the requirement
2 that a freestanding ADU must be counted as a dwelling unit for the purposes of calculating
3 density on a resource parcel. See *Friends of the San Juans v. Western Washington*
4 *Hearings Board*, Thurston County Cause No. 03-2-00672-3 (January 9, 2004) at 10 and 11.
5

6
7 **Conclusion:** Section 2 of the Ordinance does not comply with the Board's April 17, 2003,
8 Corrected Final Decision and Order as modified by Thurston County Superior Court. The
9 Ordinance allows applications for permits for freestanding ADUs to be accepted in resource
10 lands for lots of not less than 10 acres when the underlying density for a single-family
11 dwelling unit in agricultural lands is one unit per 20 acres and one unit per 40 acres in forest
12 lands. Allowing freestanding ADUs to build at this density permits an ADU in resource lands
13 to be built on lots that do not meet the underlying density needed for two single-family
14 dwelling units in resource lands. This provision as it applies to resource lands substantially
15 interferes with RCW 36.70A.020(8), because it fails to conserve productive agricultural and
16 forestry lands. It allows a conversion of those lands to residential purposes beyond the
17 limits for a single residence in designated resource lands. As a result, it is invalid pursuant
18 to RCW 36.70A.302(1).
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21
22 We accept the County's explanation that in its haste to comply with the letter and the spirit
23 of the Board's order, it made an inadvertent error in regard to applications for ADUs in
24 resource lands. In its enactments to achieve compliance regarding freestanding ADUs, the
25 County must ensure that the underlying density in resource lands is properly reflected.
26

27 C. Section 3 (Application of the Board's April 6, 2001, Order Clarifying Invalidity)
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29 **Positions of the Parties**

30 Petitioners' primary challenge is to Section 3 of the Ordinance. Petitioners argue that
31 Section 3 "guts" the County's limitations on building freestanding detached accessory
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1 dwelling units (ADUs) on rural and resource lands. Petitioners' Objection to a Finding of
2 Compliance (May 5, 2005) at 3.

3
4 Petitioners allege that the Ordinance allows construction of a second principal residence on
5 a lot where any structure existed or was permitted as long as the existing structure meets
6 the size limitation for a "guest house." Petitioners contend that under the interim ordinance
7 any owner with a lot smaller than 10 acres with a small primary residence can build a
8 second primary residence on the same lot by simply calling the existing residence a "guest
9 house." Petitioners maintain that this provision departs from the letter and the spirit of the
10 Board's order of April 6, 2001, Order Clarifying Invalidity and its April 17, 2003, Corrected
11 Final Decision and Order, and therefore, the County's regulations in regard to freestanding
12 ADUs should continue to be found noncompliant and invalid. Petitioners' Objection to a
13 Finding of Compliance (May 5, 2005) at 3 – 5.
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16
17 The County responds to this allegation by arguing that Section 3 of the Ordinance is a
18 simple attempt to preserve the spirit and the intent of the Board's April 6, 2001, Order
19 Clarifying Invalidity and to eliminate confusion regarding the appropriate standards that
20 should apply to a few people that seek construction of a primary residence under this
21 subsection. The County contends that Petitioners fail to explain that in 2001 all detached
22 ADUs were referred to as "guest houses." The County says that the first time that the
23 County used the term "detached ADU" was in Ordinance 21 – 2002 in order to better reflect
24 the Washington Department of Community, Trade and Economic Development's model
25 ordinance on accessory dwelling units. The County asserts that from a structural, design, or
26 regulatory point of view, there is no distinction between a "guest house" and a detached
27 ADU. Therefore, the County argues that it should not matter what the structure is called and
28 the use of the neutral term "ADU" is consistent with the Board's order. San Juan County's
29 Response to Petitioners' Objections to a Finding of Compliance at 3.
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1 The County contends that the 35 citizens who appeared before the Growth Board in 2001
2 described a variety of arrangements and used a variety of labels for their structures. The
3 County states that some of these structures had been built, some were under construction,
4 and some had been built years ago. The County claims that all of these structures were
5 part of these owners' dreams to include the smaller structure with plans (some written and
6 some unwritten) to build a main house. *Ibid* at 3.
7

8
9 The County argues that a detached ADU is not a second primary residence and allowing
10 construction of a few main houses where existing structures meet the definition of an ADU is
11 not a direct contradiction of the Board's order. Furthermore, the County argues that it has
12 safeguards to assure that the ADU is used as an extension of the main house. *Ibid* at 3
13

14
15 The County disagrees with Petitioners that the only limitation in Section 3 is size. It states
16 that there are other limitations on detached ADUs which are in the Board's April 6, 2001,
17 Order Clarifying Invalidity and the County's current regulations regarding ADUs. *Ibid* at 4.
18

19 Discussion

20 The Board's April 6, 2001, Order Clarifying Invalidity did not impose the finding of invalidity
21 on the County's guest house ordinance. The imposition of invalidity was part of the Board's
22 November 30, 2000, Final Decision and Order in WWGMHB Case No. 99-2-0010c. The
23 reason for the Order Clarifying Invalidity was to clarify the scope of the invalidity finding. It
24 provides:
25

26 As succinctly set forth in RCW 36.70A.302(2) a determination of invalidity is
27 prospective only and does not affect any vested permits. In the November 30, 2000,
28 order it was our intention to prohibit vesting of a second "guest house" on a lot until
29 the county completed a proper analysis of allowing such a blanket density. It was
30 never our intention to prohibit a single-family residence from being built when an
31 existing guest house that meets the guest house definition in SCC 18.40.240 was
32 already permitted or already built.

1 Therefore, we answer the County's question of whether the determination of invalidity
2 "also prohibits the issuance of a building permit for the construction a principle (sic)
3 residence if the property owners have previously constructed a guest house on the
4 property" in the negative. However, the previously constructed or permit-vested
5 "guest house" must meet the definition of SCC 18.40.240. Otherwise the second
6 residence would fall within the determination of invalidity issued on November 30,
2000.

7 *Town of Friday Harbor, Fred R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San*
8 *Juan County, WWGMHB Case No. 99-2-0010c (Order Clarifying Invalidity, April 6, 2001) at*
9 2 and 3.

10 Section 3 of Ordinance 3-2005, describes the conditions under which the County will allow
11 construction of a principal residence in addition to an existing structure with reference to the
12 Board's April 6, 2001, Order Clarifying Invalidity rather than the Final Decision and Order of
13 November 30, 2000. Section 3 of the Ordinance states:

14 Consistent with the Order of the Growth Management Hearings Board, Section 2 of
15 this ordinance shall not apply to an application for a principal residence on a parcel
16 with a structure which existed or for which permits had been obtained before
17 November 30, 2000, which structure, by its dimensions and the site design plan
18 demonstrates that it meets the requirements of the Order of the Growth Management
19 Hearings Board dated April 6, 2001 and the current regulations of San Juan County.
20 Ordinance 3-2005, Section 3.

21 We remind the parties that the invalidity finding regarding the County's guest house
22 ordinance was imposed in the Board's Final Decision and Order of November 30, 2000.
23 The April 6, 2001, Order Clarifying Invalidity did not change that order; it was intended as
24 clarification. By concentrating on the April 6, 2001, Order Clarifying Invalidity, the County
25 fails to put it in its proper context. The Board's clarifying order did nothing more than explain
26 that rights that had already vested prior to receipt of the Board's decision by the County
27 were unaffected by the Board's November 30, 2000, Final Decision and Order in *Town of*
28 *Friday Harbor, Fred R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San Juan*
29 *County, WWGMHB Case No. 99-2-0010c. RCW 36.70A.302(2).* Neither the April 6, 2001,
30 Order Clarifying Invalidity in that case nor the April 17, 2003, Corrected Final Decision and
31 Order in *this* case carved out an exception for principal residences that was different from
32

1 the statutory exception based on vested rights. *Ibid.* Indeed, there is no basis in the GMA
2 for such an exception and the Board did not attempt to create one.

3
4 To the extent that Section 3 of the Ordinance expands the exception for principal residences
5 on lots with a structure of 1000 square feet or less beyond those applications to which the
6 vested rights doctrine applies, it does not comply with the Board's November 30, 2000, Final
7 Decision and Order, the April 6, 2001, Order Clarifying Invalidity (WWGMHB Case No. 99-2-
8 0010c) and the April 17, 2003, Corrected Final Decision and Order (WWGMHB Case No.
9 03-2-0003c).

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11
12 We do not render an opinion on the question of which applications for guest houses are
13 subject to the vested rights doctrine. That decision is outside our purview. However,
14 Section 3 of Ordinance 3-2005 does not refer to vested rights. Instead, it rests on a reading
15 of the order clarifying the Board's final decision and order in 2000 which is not consistent
16 with that decision. In the most recent final decision and order (April 17, 2003, WWGMHB
17 Case No. 03-2-0003c), we found portions of the County's ADU ordinance noncompliant and
18 imposed invalidity. The prior guest house ordinance was not revived pursuant to RCW
19 36.70A.302(4) since it had also been found noncompliant and invalid. *Town of Friday*
20 *Harbor, Fred R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San Juan County,*
21 *WWGMHB Case No. 99-2-0010c, (Final Decision and Order, November 30, 2000).* If the
22 applications that the County describes in Section 3 of Ordinance 3-2005 are those which
23 had rights to develop vested to the County's guest house or ADU ordinance prior to the
24 imposition of invalidity, then that should be the basis for the exception in Section 3. As
25 written, Section 3 fails to comply with the GMA and continues to allow more intense
26 residential development in rural and resource lands than the residential density provided for
27 those lands, in violation of RCW 36.70A.110(1), RCW 36.70A.070(5)(b) and (c), and RCW
28 36.70A.060 and substantially interferes with Goals 2 and 8 of the GMA.
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1 **Relationship of this Order to Case No. 05-3-0015**

2 On June 21, 2005, Friends of San Juans, Lynn Bahrych, and Joe Symons filed a petition for
3 review challenging Ordinance No. 03-2005 for failing to comply with RCW 36.70A.020(2),
4 36.70A.020(8), 36.70A.060(1), and 36.70A.110(1). The petition for review notes that the
5 Ordinance was filed as part of the County's compliance report. The Board assigned Case
6 No. 05-2-0015 to this petition and held a prehearing conference. While this petition has not
7 been consolidated with 03-2-0003c, our decision in this compliance action necessarily
8 addresses the compliance of Ordinance 03-2005 with the GMA, and whether it substantially
9 interferes with fulfillment of the goals of the GMA.
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12 The County has stated that this ordinance was not offered to achieve compliance or have
13 invalidity lifted, but to show the County's good faith effort to comply with the Board's orders
14 of December 3, 2004, and April 17, 2003, in this case. However, the Board's determination
15 under the GMA is whether the action complies with the GMA:
16

17 The board shall conduct a hearing and issue a finding of compliance or
18 noncompliance with the requirements of this chapter and with any compliance
19 schedule established by the board in the final order.
20 RCW 36.70A.330(2) (in pertinent part).

21 The County has offered Ordinance No. 3-2005 as part of its compliance efforts, and
22 therefore, the Board has the responsibility to determine if the Ordinance is compliant with
23 the GMA. See CPSGMHB Case No. 92-3-0001, *Tracy v. Mercer Island* (Final Decision and
24 Order, January 5, 1993).
25

26 The same decision should apply to the question of whether Ordinance 03-2005 complies
27 with the GMA, whether that question is raised on compliance or in a new petition for review.
28 Since the Board in this decision has found that the Ordinance does not comply with RCW
29 36.70A.110(1), RCW 36.70A.060, and RCW 36.70A.070(5)(b)(c), and substantially
30 interferes with RCW 36.70A.020(2) and (8), the issues of noncompliance and invalidity
31 regarding Ordinance No. 03-2005 raised in the petition for review in Case No. 05-2-0015,
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1 have also effectively been determined. Upon motion brought within 10 days of the date of
2 this decision, the Board will consider any arguments why this decision should not apply to
3 the new case, WWGMHB Case No. 05-2-0015.
4

5 **VI. FINDINGS OF FACT**

- 6 1. San Juan County is a county located west of the crest of the Cascade Mountains that
7 is required to plan pursuant to RCW 36.70A.040.
- 8 2. Petitioners are organizations and individuals that offered written or oral comments to
9 the County regarding the provisions challenged here during the adoption process.
- 10 3. The Board's April 17, 2003, Corrected Final Decision and Order found that the
11 County's regulations regarding freestanding ADUs in rural and resource lands did not
12 comply with RCW 36.70A.020(2) and (8) and RCW 36.70A.110(1) because these
13 regulations did not count the freestanding ADU as a unit of density for the purpose of
14 calculating the underlying density. The Board also found that these regulations
15 substantially interfere with RCW 36.70A.020(2) and are invalid pursuant to RCW
16 36.70A.302(1).
- 17 4. The Board's December 3, 2004, Order on Issues for Reconsideration found that the
18 County's regulations regarding freestanding ADUs in rural and resource lands were in
19 continuing noncompliance and invalidity and gave the County 120 days to bring its
20 regulations regarding freestanding ADUs in rural and resource lands into compliance.
21
- 22 5. San Juan County plans to obtain final resolution of the lawsuit regarding accessory
23 dwelling units before undertaking the public process of amending its development
24 regulations regarding detached accessory dwelling units in rural and resource lands.
- 25 6. The County adopted Ordinance 3 – 2005 on April 12, 2005, not to achieve compliance
26 or to have invalidity lifted, but to show that they were complying with the spirit and
27 letter of the Board's December 3, 2004, order.
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- 1 7. Ordinance 3 – 2005 is an interim ordinance that establishes a five-month moratorium
2 on accepting applications for building permits for freestanding ADUs in rural and
3 resource comprehensive plan land use designations on lots not less than 10 acres.
4 8. Ordinance 3 – 2005 expires on September 12, 2005. Unless the County adopts a
5 permanent amendment to its development regulations which cures its noncompliant
6 ADU provisions prior to that date, it will not have GMA compliant development
7 regulations after that date.
8 9. The responsibility and authority for determining which permits were vested previous to
9 the Board's April 6, 2001, does not rest with the Board. RCW 36.70A.302 (2) and
10 RCW 36.70A.280 (1).
11 10. The allowable density in the County's Agricultural Resource Land designation is one
12 dwelling unit per 20 acres and one dwelling unit per 40 acres in the County's Forest
13 Resource Land Designation. The Ordinance allows applications for permits for
14 freestanding ADUs to be accepted in resource lands for lots not less than 10 acres.
15 11. The Board's April 17, 2003, Corrected Final Decision and Order required that
16 freestanding ADUs in resource lands need to be counted as single-family dwelling
17 units for the purpose of calculating the underlying density. The Thurston County
18 Superior Court upheld this ruling. *Friends of the San Juans v. Western Washington*
19 *Hearings Board*, Thurston County Cause No. 03-2-00672-3 (January 9, 2004).
20 12. The Board's April 6, 2001, Order Clarifying Invalidity did not change the Board's Final
21 Decision and Order of November 30, 2000, but merely explained that rights vested
22 prior to the November 30, 2000, decision and order were unaffected by the imposition
23 of invalidity in that order.
24 13. The Board's April 6, 2001, Order clarified that vested rights for principal residences
25 were not affected by its November 30, 2000, order. *Town of Friday Harbor, Fred R.*
26 *Klein, John M. Campbell, and Lynn Bahrych, et al. v. San Juan County, WWGMHB*
27 *Case No. 99-2-0010c.*
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Findings of Fact Related to Invalidity

- 14. Ordinance 3 – 2005, Sections 2 and 3, allows permits for the construction of freestanding dwelling units in lots in resource lands in addition to a primary residence without counting those freestanding ADUs as additional density. This increased density fails to conserve productive agricultural and forestry lands. It allows a conversion of those lands to residential purposes beyond the limits for a single residence in designated resource lands.
- 15. Section 3 of Ordinance 3 – 2005 also allows permits for the construction of freestanding dwelling units in rural areas without counting those freestanding ADUs as additional density. This increased density in rural areas converts undeveloped rural lands into low-density sprawl.

VII. CONCLUSIONS OF LAW

- A. This Board has jurisdiction over the parties and subject matter of the issues related to the enactment of Ordinance 3 – 2005 as a compliance effort on the part of the County.
- B. The Petitioners have standing to bring their claims and raised them in a timely manner.
- C. Ordinance 3 -2005 is an interim measure and compliance cannot be achieved with an interim ordinance.
- D. By allowing permits for freestanding ADUs on lots of not less than 10 acres in resource lands, Ordinance 3 – 2005, Section 2, fails to conserve resource lands and does not comply with RCW 36.70A.060.
- E. By allowing permits for primary residences on lots in resource lands with existing small dwelling units, Ordinance 3 – 2005, Section 3, fails to conserve resource lands and fails to comply with RCW 36.70A.060.
- F. By allowing permits for primary residences on lots in rural lands with existing small dwelling units, Ordinance 3 – 2005, Section 3, allows higher than rural densities in

1 rural areas and fails to comply with RCW 36.70A.110(1) and RCW 36.70A.070(5)(b)
2 and (c).

3
4 **Conclusions of Law Related to Invalidity**

- 5 G. Ordinance 3 – 2005, Section 2, substantially interferes with the fulfillment of Goal 8 of
6 the GMA (RCW 36.70A.020(8)) and is therefore invalid.
7
8 H. Ordinance 3 – 2005, Section 3, substantially interferes with the fulfillment of Goals 2
9 and 8 of the GMA (RCW 36.70A.020(2) and (8)) and is therefore invalid.

10
11 **VIII. ORDER**

12 The County must bring its development regulations with respect to freestanding ADUs into
13 compliance with the GMA within 90 days of the date of this order. The County must also
14 provide the Board with a progress report within 60 days of the date of this order or within 10
15 days of the issuance of a decision by the Court of Appeals, whichever is sooner. The Board
16 will review the progress report to determine whether additional time is needed for the
17 County to achieve compliance. The following schedule shall apply unless modified in writing
18 by subsequent order:
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| 22 Progress Report Due | September 19, 2005 |
| 23 Compliance Due | October 19, 2005 |
| 24 Compliance Report Due | October 28, 2005 |
| 25 Objections to a Finding of Compliance Due | November 14, 2005 |
| 26 County Response to Objections Due | November 28, 2005 |
| 27 Compliance Hearing | December 6, 2005 |

28

29 Pursuant to RCW 36.70A.300 this is a final order of the Board.
30 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
31 mailing of this Order to file a petition for reconsideration. Petitions for
32 reconsideration shall follow the format set out in WAC 242-02-832. The original and

1 three copies of the petition for reconsideration, together with any argument in
2 support thereof, should be filed by mailing, faxing or delivering the document directly
3 to the Board, with a copy to all other parties of record and their representatives.
4 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
5 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
6 filing a petition for judicial review.

7 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the
8 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
9 judicial review may be instituted by filing a petition in superior court according to the
10 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
11 Enforcement. The petition for judicial review of this Order shall be filed with the
12 appropriate court and served on the Board, the Office of the Attorney General, and all
13 parties within thirty days after service of the final order, as provided in RCW
14 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
15 but service on the Board means actual receipt of the document at the Board office
16 within thirty days after service of the final order.

17 SO ORDERED this 21st day of July 2005.

18 _____
19 Holly Gadbaw, Board Member

20 _____
21 Margery Hite, Board Member

22 _____
23 Gayle Rothrock, Board Member