BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Stephen F. Ludwig, et al, Petitioners, v. San Juan County, Respondent,	**CASE NO. 05-2-0019c** **COMPLIANCE ORDER - EASTSOUND UGA**
Fred R. Klein, Petitioner, v. San Juan County, Respondent.	**CASE NO. 02-2-0008** **COMPLIANCE ORDER - EASTSOUND UGA**
John M. Campbell, et al, Petitioner, v. San Juan County, Respondent.	**CASE NO. 05-2-0022c** **COMPLIANCE ORDER - EASTSOUND UGA**

I. SYNOPSIS OF THE DECISION

San Juan County has struggled to establish an Eastsound Urban Growth Area (UGA) for almost a decade. The effort has proceeded with fits and starts due largely to turnover in staff until just recently. This endeavor also illustrates the difficulty that rural counties have in designating a UGA due to the expense of providing urban services and the reliance on

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outside service providers such as special districts that are not required to plan according to the Growth Management Act (GMA) or subject to the Board's jurisdiction.

The issues before the Board in this compliance hearing are set forth in our June 20, 2006 Final Decision and Order/Compliance Order. These issues include the adequacy and lack of incorporation of sewer and storm drainage plans in the County's Comprehensive Plan, presence of less than urban densities in the UGA, and failure of the Eastsound Sewer District's (District) Plan to serve the entire UGA for the 20-year planning period.

This order finds that the areas designated with less than urban densities have environmental constraints and will be served by sewer. For that reason including them in the UGA complies with the GMA.

The County has incorporated its storm drainage plan and the District's sewer plan into its Comprehensive Plan to fulfill the GMA's planning requirements for a capital facilities element. These plans also demonstrate that these facilities can be extended throughout the UGA and financed over the Comprehensive Plan's 20-year planning period. The final stumbling block for the County is the District's Plan, now part of the County's Comprehensive Plan, that shows sewer lines extending far from the UGA's boundaries. This is not consistent with the Comprehensive Plan's Land Use Element or the UGA boundaries and does not comply with RCW 36.70A.110(4), RCW 36.70A.070, and RCW 36.70A.020(2).

A major issue of contention for Petitioners Klein and Campbell is that the County's land capacity analysis does not demonstrate that there is enough residential land supply because areas in the UGA zoned Village Residential (VR) are occupied by institutional and commercial uses. Here, the County used a market factor and seasonal home factor to add more land than it actually needed to account for land that might be developed over the planning period and homes used by seasonal residents. Petitioners object to the County using these factors to account for institutional land that might occupy VR zoned land. The

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Board finds that using the market factor for this purpose is not clearly erroneous. Although institutional and commercial uses will most likely occupy VR-zoned land in the future, the market and seasonal home factors provide that the Eastsound UGA has sufficient capacity to provide for its future residential, commercial, and institutional uses.

II. RECENT PROCEDURAL HISTORY[1]

On June 20, 2006 the Board issued the Final Decision and Order/Compliance Order (Eastsound UGA) in WWGMHB Cases 05-2-0019c, 02-2-0008, and 05-2-0022. These cases are being heard together. That Order found that San Juan County's designation of the 2005 Eastsound UGA was not compliant for the following reasons: (1) failure to incorporate financing plans for sewer and storm drainage facilities in the County's six-year capital facilities plan, (2) "failure to show its work" for commercial and institutional uses and adequately analyze the need for commercial and institutional land, (3) zoning areas within the UGA at less than urban densities without showing the local circumstances that warrant these lower densities, and (4) failure of the capital facilities element to show that urban levels of service are planned within the entire UGA in the 20-year planning period. That Order also found that the County's designation of the Eastsound UGA was noncompliant because it did not have a capital facilities plan that showed that sewer service could be delivered to all parts of the UGA in violation of RCW 36.70A.110(3) and (4) and RCW 36.70A.020(2). That Order established December 18, 2006 as the compliance deadline. [2]

The Board issued Orders extending the compliance deadline for 180 days on January 19, 2007, June 19, 2007, January 18, 2008, and June 6, 2008. The June 19, 2007 order required San Juan County to engage in mediation with the Eastsound Sewer District. The June 6, 2008 order that granted an extension also denied Petitioner Austin's Motion for Invalidity.

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[1] For a more complete procedural history see Final Decision and Order/Compliance Order (June 20, 2006) at Appendix A.

[2] Final Decision and Order/Compliance Order (June 20, 2006) at 35.

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On September 11, 2008, San Juan County filed its compliance report. Petitioners Klein, Campbell, and Austin all filed timely responses.

Petitioner Klein filed a motion to add to the index on September 22, 2008 to which the County responded on October 6, 2008. Petitioner Klein filed a motion to disregard the County's Response on October 10, 2008, and the County responded on October 23, 2008. This Order denies those motions.

On October 21, 2008, the County filed its Response to Objections to a Finding of Noncompliance.

A Compliance Hearing was held on October 30, 2008 at the Fire Station on Orcas Island. All three Board Members attended. Holly Gadbaw presided. Petitioners Fred Klein, John Campbell, and Dorothy Austin represented themselves. Jonathan Cain represented San Juan County.

At the hearing the Board asked the County to submit supplemental information, which it did on November 20, 2008. Petitioners Klein and Campbell asked permission to respond, which the Presiding Officer granted. On December 1, 2008, Fred Klein filed an Objection to San Juan County's Supplemental Authorities.

III. PRELIMINARY MATTERS

A. Motion to Supplement the Record and Motion to Disregard County's Response Brief

Positions of the Parties

On September 22, 2008, the Board received Petitioner Klein's Motion to Supplement the Record and Memorandum in Support There Of with the following items:

- Proposed Index Numbers 000901, 902 – San Juan County Auditor File No. 2005 1014006, Pages 1 and 2,

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- Proposed Index Numbers 000903, 000904, 000905 – San Juan County Auditor File No. (1980) 11718, Vol.2. Pages 76, 76A, 76B,
- Proposed Index Numbers 000906 and 907 – San Juan County Auditor File 94052739, Volume 6, Pages 71, 71A,
- Proposed Index Number 000908 – San Juan County Auditor File No. 2005 10140007, Pages 5 -7, and
- Proposed Index Numbers 000909 and 000910 – San Juan County Auditor File 2007 1107023, Volume 7, Pages 101, 101A.

Petitioner says these items would substantially assist the Board in evaluating the County's land capacity analysis and show that the County does not have sufficient land available to meet the anticipated commercial, institutional, and residential growth through 2020. [3]

San Juan County's Response to Motion to Supplement the Record was filed on October 6, 2008. The County says the documents submitted by Petitioner were not submitted to the County as part of its compliance efforts. The County argues that because these documents describe restrictions that can be modified or overcome, they will not substantially assist the Board.[4]

On October 10, 2008, Petitioner Klein submitted Motion to Disregard San Juan County's Response Opposing Motion to Supplement the Index to the Record. Petitioner says that the County made no objection to his motion to supplement the index until after he had submitted his brief and the County had assessed the strength of his argument. Petitioner further notes that the County's response to his motion to supplement was made after the ten-day deadline to respond to motions. For these reasons, Petitioner asks the Board not to accept the County's motion.[5]

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[3] Motion to Supplement the Index to the Record and Memorandum in Support There Of at 2 and 3.
[4] San Juan County's Response to Motion to Supplement the Record at 2.
[5] Motion to Disregard San Juan County's Response Opposing Motion to Supplement the Index to the Record at 2 and 3.

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San Juan County's Response to Motion to Disregard was submitted on October 23, 2008. The County argues that its motion was timely because according to WAC 242-02-534 the appropriate date to calculate when the response is due is from the date the County received the motion, which was September 23, 2008. The County further informs the Board that the attachments to the subject motion were not received until September 26, 2008. The County notes it filed its response ten days after it received the motion and the attachments. [6]

The County contends the Board established the deadline for filing Petitioners' brief in its June 6, 2008 Order Granting an Extension and Denying Motion for Invalidity. The County says the timing of Petitioner's motion to supplement was determined by him, and even if the date of filing was considered complete on September 23, 2008, the County could not have responded by the time Petitioner's brief was due.[7]

Board Discussion

The following Board rules of procedure are pertinent to this discussion:

WAC 242-02-540:

> Generally, a board will review only the record developed by the city, county, or state in taking the action that is the subject of review by the board. A party by motion may request that a board allow such additional evidence as would be necessary or of substantial assistance to the board in reaching its decision, and shall state its reasons. A board may order, at any time, that new or supplemental evidence be provided.

WAC 242-02-534 (1):

> A party served with a motion shall have ten days from the date of receipt of the motion to respond to it, unless otherwise directed by the presiding officer. A response to the motion shall be filed with a board and a copy served on the opposing party/parties.

The County maintains it did not receive the motion until September 23, 2008, and did not receive the documents which Petitioner seeks to add to the index until September 26, 2008.

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[6] San Juan County's Response to Motion to Disregard at 2 and 3.
[7] Id. at 3.

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The Board received Petitioner's motion to supplement on September 22, 2008 by e-mail and a hard copy of the motion and attachments postmarked September 22, 2008. That is the date from which the deadline for responses is calculated.

At argument, Petitioner did not dispute supporting documents were not mailed to the County with the motion. The Board finds that without the supporting documents it would be difficult for the County to evaluate them and prepare a response. In this situation, the deadline for a response should be calculated from the time the County received the supporting documents. Because the County received the supporting documents on September 26, 2008, the County's response was filed on October 6, 2008, ten days from the date the supporting documents were received by the County. Therefore, the County's response was not untimely pursuant to WAC 242-02-534.

At argument, Petitioner Klein did not disagree with the County's assertion that he had not submitted the auditor's records to the County that questioned the County's interpretation of data as part of the compliance process. Generally, the Board will only review evidence that was part of the County's record. Petitioner does not state why he could not have submitted this evidence to the County as it was available at the time the County was making its decision. While the data was available to the County, Petitioner should have presented the data and argument to the County during the compliance process so that the County could respond to it.

Conclusion: Based on the foregoing, Petitioner Klein's Motion to Disregard San Juan County's Response Opposing Motion to Supplement the Index to the Record is DENIED. Petitioner Klein's Motion to Supplement the Record and Memorandum in Support There Of is DENIED.

B. Post Hearing Submittals

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On November 20, 2008, the County submitted San Juan County's Supplemental Authorities (Eastsound UGA) in response to the Board's request at the hearing on the merits. These included the following attachments: a 1977 Franchise Agreement between San Juan County and the District, excerpts from the Districts National Pollutant Discharge Permit, various excerpts from the County Code, a November 4, 2008 Letter to the District from Deputy Prosecutor Jonathan Cain, a November 12, 2008 Letter to Jonathan Cain from the District with attached list of sewer connections made between 2005-2008, and a map entitled Residential Land Use in Eastsound.

Petitioners Klein and Campbell asked for permission to respond to the County's submittal, which was granted by the Presiding Officer.

Petitioner Klein submitted Motion Objecting to San Juan County's Supplemental Authorities. With his submittal, Petitioner Klein attached the November 4, 2008 letter from Jonathan Cain to the District, a November 17, 2008 letter from Randall Gaylord to the District, Petitioner's Exhibit E - an annotated version of the map entitled Residential Land Use In Eastsound showing commercial uses in the Village Residential Zone and various assessor's records.

As for the assessor's records, there is no indication in the Index to the Record that these were submitted to the County during the compliance proceedings, so the Board will not consider them.

Petitioner Campbell submitted Motion to Amend Respondent's Supplemental Authorities. He attached an enlarged map of the Village Commercial and Village Residential Zones showing the commercial uses occupying the Village Residential Zone, various assessor's records, a October 12, 2007 letter to Peter Fisher, Chair of EPRC, November 25, 2008 e-mail from Colin Maycock to Fred Klein, and various sections the San Juan County Code regarding the Village Residential District.

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As with the other assessor's records submitted by Petitioner Klein, as there is no indication in the index that they were submitted to the County they will not be considered by the Board.

IV. BURDEN OF PROOF

After a board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt a legislative enactment to achieve compliance. RCW 36.70A.300(3)(b). After the period for compliance has expired, the board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and (2).

For purposes of board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous. RCW 36.70A.320(1),(2) and (3). If a finding of invalidity has been entered, the burden is on the local jurisdiction to demonstrate that the ordinance or resolution it has enacted in response to the finding of invalidity no longer substantially interferes with the goals of the GMA. RCW 36.70A.320(4).

In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Within the framework of state goals and requirements, the boards must grant deference to local governments in how they plan for growth:

> In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter, the legislature intends for the boards to grant deference to the counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties

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> and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.
> RCW 36.70A.3201 (in part).

In sum, the burden is on the Petitioner to overcome the presumption of validity and demonstrate that any action taken by the County is clearly erroneous in light of the goals and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2). Where not clearly erroneous and thus within the framework of state goals and requirements, the planning choices of the local government must be granted deference.

V. ISSSUES TO BE DISCUSSED

These issue statements are based on the issues on which the Board found the County noncompliant in the June 20, 2006 Final Decision and Order/Compliance Order:

Issue One: Does the County's capital facilities element incorporate a capital facilities plan for sewer service in the Eastsound UGA in order to comply with RCW 36.70A.070(3)?[8]

Issue Two: Does the County's capital facilities element include a six-year financing plan for its storm drainage facilities for the Eastsound UGA in order to comply with RCW 36.70A.070 (3)(a) – (d) and RCW 36.70A.020(12)?[9]

Issue Three: Has the County's "shown its work" for the Eastsound UGA's commercial and institutional needs and adequately analyzed the needed land for commercial and institutional uses in order to comply with RCW 36.70A.110(2) and RCW 36.70A.115?[10]

Issue Four: Has the County provided evidence to show that the areas within the UGA zoned for less than urban densities is based on the local circumstances that warrant such lower densities in order to comply with RCW 36.70A.020(1), (2) and RCW 36.70A.110(1)?[11]

Issue Five: Does the capital facilities element for the Eastsound UGA demonstrate that

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[8] Final Decision and Order/Compliance Order (June 20, 2006) at Conclusion of Law A at 34.
[9] Id. at Conclusion of Law B.
[10] Id. at Conclusion of Law C.
[11] Id. at Conclusion of Law E.

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urban levels of service are planned for the entire UGA during the 20-year planning period in order for the boundaries of the Eastsound UGA to comply with RCW 36.70A.110(3) and RCW 36.70A.020(12)?[12]

Issue 6: Does the capital facilities plan fail to provide urban levels of service to all areas of the UGA during the 20-year planning period and are the boundaries of the UGA compliant with RCW 36.70A.110(3) and (4) and RCW 36.70A.020(12)?[13]

Petitioners raise the following issues:

Issue 7: Does the Eastsound UGA provide for affordable housing?[14]

Issue 8: Does the Eastsound UGA provide for enough industrial land?[15]

Issue 9: Does the Eastsound UGA's capital facilities plan provide for adequate water service to the UGA?[16]

VI. DISCUSSION OF THE ISSUES

A. Sewer Capital Facilities Plan

1. Compliance with RCW 36.70A.070 (3)(d)

Issue One: Does the County's capital facilities element incorporate a capital facilities plan for sewer in the Eastsound UGA into its comprehensive plan in order to comply with RCW 36.70A.070(3)?[17]

Issue Five: Does the capital facilities element for the Eastsound UGA demonstrate that urban levels of service are planned for the entire UGA during the 20-year planning period in order for the boundaries of the Eastsound UGA to comply with RCW 36.70A.110(3) and RCW 36.70A.020(12)?[18]

We will discuss these issues together.

The June 20, 2006 Final Decision and Order/Compliance Order found,

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[12] Id. at Conclusion of Law F.
[13] Id at 22.
[14] Petitioner's Brief Compliance Hearing at 18 and 19. Petitioner's Brief at 2.
[15] Petitioner's Brief at 2.
[16] Objections to a Finding of Compliance at 1.
[17] Final Decision and Order/Compliance Order (June 20, 2006) at Conclusion of Law A at 34.
[18] Id. at Conclusion of Law F.

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> The County's capital facilities plan for sewer and storm drainage facilities for the Eastsound UGA is not compliant with RCW 36.70A.070(3)(a) – (d). [19]
>
> Because the capital facilities plan fails to provide for urban levels of sewer service to all areas of the UGA during the 20-year planning period, the boundaries of the UGA are not compliant with RCW 36.70A.110(3) and (4); and RCW 36.70A.020(12).[20]

Ordinance 39-2008 amended the County's Comprehensive Plan to incorporate by reference the Eastsound Water and Sewer District's (District) 2008 Update of 2003-2023 General Sewer Plan.[21] The sewer capital facilities plan now includes an inventory of existing sewer capital facilities, a forecast of future needs and the proposed locations of new facilities to support the entire UGA and a six-year capital facility financing plan. [22] The sewer plan also shows how sewers will be financed over the 20-year life of the plan.[23]

Petitioner Austin alleges that "public money" as referenced in RCW 36.70A.070(3)(d) means money from a municipal corporation, such as a city or county, and does not mean the District's user fees, surcharges, and capital reserve funds which she argues are not sources of public money. Since the District uses these sources, Petitioner Austin contends that such use violates the GMA.[24] Sewer Districts are authorized by RCW 57.02.020. The Board has held that counties can rely on water and sewer districts to provide capital facilities to UGAs as long as the plan is incorporated into the comprehensive plan to fulfill GMA requirements.[25] The Board agrees with the County that the sources of money to which Petitioner objects are commonly used to fund sewer plans and that the District is authorized by RCW 57.08.050 to fix rates, assess connection charges, and sell bonds.

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[19] Id. at 11.
[20] Id. at 22.
[21] Record at 000701.
[22] Record at 000714, 000719, 000731, and 000732..
[23] Record at 000733.
[24] Objections to a Finding of Compliance at 1 and 2.
[25] See Final Decision and Order/Compliance Order (Lopez Island UGA) at 14 and 15 and *Whidbey Island Environmental Network v. Island County*, WWGMHB 03-2-0008 at 11.

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Conclusion: The District's Sewer 2008 Update of the 2003-2023 General Sewer Plan adopted by reference into the County's Comprehensive Plan now complies with RCW 36.70A.070(3)(a)–(d), RCW 36.70A.110(3), and RCW 36.70A.020(12).

2. Extension of Sewer Lines Outside the UGA

Positions of the Parties

Petitioners' Position

Petitioner Klein charges the District's sewer plan is not coordinated or consistent with the County's land use element because the District's map of existing and proposed facilities shows that the District's sewer service area extends east and west of the UGA boundaries and shows extension of sewer lines outside of the UGA. Petitioner Klein argues that the extension of lines outside of UGA boundaries does not comply with RCW 36.70A.110(4) and is not consistent with the County's statement that "Existing regulations prohibit the extension of urban services out of UGAs, master planned resorts, or areas of more intense rural development", as referenced in the Board's Order Granting Extension and Denying Motion for Invalidity.[26]

Petitioner Klein points out various sewer lines that extend beyond the UGA that include: (1) an existing sewer line east of the UGA serves Bartwood Estates and was constructed in the 1990's and in 2003 extended to serve Scenic Lane, (2) a sewer line on Sunset Avenue that he says was built in 2006 funded by Developer Funds and is scheduled to be extended again, and (3) an additional sewer line extension east and south of the UGA boundaries that is intended to serve Country Corner, an area proposed to be designated as a LAMIRD that has not been designated as a LAMIRD.[27]

Petitioner Austin argues the District has no legal contractual agreement with the County to provide sewer service to the UGA or prevent sewer extension into rural areas as forbidden

[26] Compliance Hearing Petitioners' Brief at 9 and 10.
[27] Compliance Hearing Petitioner's Brief at 7 -9.

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by SJCC 18.60.250. Petitioner Austin claims that the District is bound by its National Pollution Elimination (NPDES) permit, and the County does not have the authority to overrule federal law. Petitioner Austin also contends that it would be absurd, illegal, and unethical for the District to allow a health or environmental hazard to develop before extending a sewer line to an area with too many drainfields or allow an aquifer to degrade.

County's Position

The County states Petitioners' objections to lack of an agreement with the District and the extension of sewer services outside of the UGA are not part of the compliance order and are aspects of the new District sewer plan, and therefore should have been the subject of a new petition. [28] Nevertheless, the County addresses Petitioners' allegations.

The County says that the District plan acknowledges circumstances under which sewer service can be provided outside the UGA. The plan indicates service to the LAMIRD study area which was identified in Ordinance 13-2005. The plan acknowledges the District is concerned about existing, mature, non-rural neighborhoods to the east of the UGA with aging septic drainfields that present a considerable risk to the Eastsound aquifer. The County says its development regulations prevent extension to the Country Corner Area unless it is designated a LAMIRD or where it is necessary to protect public health and safety. [29]

The County asserts the GMA does not require the removal of existing facilities from rural areas. The County explains the 2003 version of the sewer plan did not show the UGA boundaries but the version of the plan adopted by reference by the County shows the UGA boundary. According to the County the District's sewer service area is defined by the Certification of Necessity and approved by the Washington Department of Ecology

[28] San Juan County's Response to Objection to a Finding of Compliance at 12.
[29] Id. at 13.

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(Ecology), but does not relieve the District from complying with applicable state and local statutes.[30]

In regard to Petitioner Austin's argument that the County has no agreement with the District, the County responds that Petitioner does not cite any authority that requires this nor did the Board's order find the lack of an agreement to be noncompliant.

Board Discussion

The Board will first address the County's argument that if Petitioner Klein wanted to challenge the inconsistency of the land use element and the capital facilities element, he needed to file a new petition. The County adopted the District's sewer plan to achieve compliance with the RCW 36.70A.070(3). RCW 36.70A.070 requires that all elements of the comprehensive plan be consistent and coordinated with each other. The Board's compliance order also found that the District's sewer plan did not show how sewer was going to be provided throughout the UGA and the sewer plan did not comply with RCW 36.70A.110(3) and (4).[31] The issue in the compliance order and before the Board now is how does the County intend to have sewer services provided to the Eastsound UGA in a compliant manner. Therefore, when the County adopts a new part of its capital facilities element, it must be consistent with the other parts of the plan and comply with the GMA. When the County adopted the District's sewer plan as part of the County's Comprehensive Plan, it triggered the requirement that the sewer plan must be consistent with the County's land use element. Therefore, Petitioner did not have to file a new petition to challenge the capital facilities element to raise objections concerning the consistency of the District's sewer plan with the land use element.

The challenge to the consistency of the District's sewer plan and the land use element presents a difficult dilemma for the County which must rely on the District to provide urban

[30] Id. at 15.
[31] Final Decision and Order/Compliance Order at 22.

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services to Eastsound UGA. Complicating this, the GMA does not apply to the development of plans of special districts, including water and sewer districts so the Board has no jurisdiction over their plans. See RCW 36.70A.280(1).

RCW 57.16.010 outlines the process for adoption of sewer and water district comprehensive plans and amendments. This process includes approval of the sewer comprehensive plan by the County and specifically requires that the "comprehensive plan shall not provide for the extension or location of facilities that are inconsistent with the requirements of RCW 36.70A.110".

A 2001 Certificate of Necessity (Certificate) granted by Ecology defines the boundaries of the District's sewer service area. This Certificate states that Ecology's approval does not relieve the District from complying with other state and local statutes.[32] The local regulation that applies in this situation is SCC 18.60.250(D)(1) which prohibits urban level facilities and services outside of UGAs, Master Planned Resorts, or LAMIRDs that had not been completed, were being constructed, or had completed planning or budgeting by January 1, 2001. [33]

While the Board has no jurisdiction over County approval of the District's Plan pursuant to RCW 57.16.10, it does have jurisdiction to determine whether the County's Comprehensive Plan's capital facilities element, of which the District's sewer plan is now a part, complies with the GMA.

Petitioner Klein says the District's Sewer Plan shows extensions outside of the UGA, which violates the GMA. The Board notes the extension on Bartel Road, which Petitioner says was constructed in the 1990s, was constructed before the boundaries of the UGA were reduced in 2005 and before the 2001 date indicated in SCC 18.60.250(D)(1) so they would

[32] Record at 000830.
[33] Projects meeting those criteria are considered pre-existing projects.

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be considered existing facilities. Another smaller sewer extension outside the UGA pointed out by Petitioner is the extension on Sunset Avenue which the District's Plan indicates was completed in 2006.[34] The Board notes that completion was after the UGA's reduction by Ordinance 13-2005. However, there is no evidence in the record for the Board to evaluate whether the County ignored SCC 18.60.250(D)(1) or that construction was underway before boundaries of the UGA were reduced for this sewer extension. The Board agrees with the County that there is no requirement that existing sewer facilities need to be removed.

Petitioner Klein questions the District's proposal to improve the sewer line on Sunset Avenue. [35] Petitioner Klein declares he had conversations with the District's manager that the County pressured the District to call this capital facility's project an improvement rather than an extension. [36] The District's map illustrating existing and proposed facilities shows the current extension outside the UGA as an existing facility and shows no further extension. [37] At the Board's request, the County was asked to clarify what constituted the "improvements" on Sunset Avenue listed as funded by a Developer Extension Agreement. Letters from the County requesting this information provided by the County and the Petitioner do not constitute improper pressure.[38] A November 12, 2008 District letter states the improvements are not an extension.[39]

However, the long proposed sewer extension along Mount Baker Road and Terrill Beach Road extending far from the UGA boundaries proposed to serve Country Corner, an area the County is considering designating a LAMIRD, and potential health hazards, concerns the Board. Both Petitioner Austin and the District's Plan express concern about urban style

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[34] Record 000731.
[35] Compliance Hearing Petitioner's Brief at 8.
[36] There is no indication in the record that Petitioner Klein submitted his declaration to County during the compliance proceedings. Therefore, the Board will not consider it.
[37] Record at 000714.
[38] Exhibit A to San Juan County's Supplemental Authority.
[39] Attachment B to San Juan County's Supplemental Authority.

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subdivisions outside the UGA presenting potential for pollution of the Eastsound aquifer. No documentation of aquifer contamination exists in the record. Likewise, while urban services can be provided in a LAMIRD, under conditions that do not promote urban sprawl, no evidence is contained in the record that the Country Corner area has been designated a LAMIRD.

This situation is analogous to a similar situation in Thurston County. In that situation the Supreme Court found noncompliant an extension of a proposed sewer line to a more densely developed rural area where no threat to human health had been documented and which had not been designated a LAMIRD .[40] The Court also noted the pressure to urbanize the extension of urban services creates:

> …we find it significant that the GMA seeks to reduce "the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW 36.70A.020(2). The provision at issue, which guards against the extension or expansion of urban governmental services into designated rural areas, is certainly consistent with that purpose. So also is the Board's conclusion that "[t]he Legislature has recognized that intrusion or extension of urban services to rural areas inevitably creates pressure to urbanize. That is the reason that the strict 'necessary to protect' test was adopted rather than a 'betterment of health or environment' standard." (reference eliminated)[41]

Therefore, the Board disagrees with Petitioner Austin that the County's Comprehensive Plan should propose sewer lines outside of a UGA where a documented health hazard may occur in the future. By including the District Plan's proposed extensions outside the UGA, including an extension to a nonexistent LAMIRD, where no documented health hazard exists, and no investigation of other alternatives to sewer service has been discussed in its capital facilities element, the County's capital facilities element for sewer service does not comply with RCW 36.70A.110(4). Such extensions increase the pressure to urbanize in rural areas and increase the potential for sprawl in violation of RCW 36.70A.020(2). Also,

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[40] *Thurston County v. Cooper Point Association*, 148 Wn.2d1 at 9-11.
[41] Id. at 13.

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these extensions make the capital facilities element and the land use element inconsistent in violation of RCW 36.70A.070.

Both Petitioners Klein and Austin contend the County and District's lack of agreement violate the GMA and the Board's order, while the County argues the Board has no authority to mandate agreement. Despite rulings in the past in other cases[42], the Board agrees that we have no such authority. However, RCW 57.16.010 requires the County to approve the District's Plan and the incorporation of the District's Plan into the County's Comprehensive Plan constitutes agreement. Further, according to RCW 57.16.010, the County only needed to adopt certain parts of the District's plan. More specifically, the County only needed to incorporate the parts of the District's Plan necessary to fulfill GMA requirements and comply with the GMA.

Conclusion: By including the District Plan's proposed extensions outside the UGA including an extension to a nonexistent LAMIRD, an area where no documented health hazard exists, and no investigation of alternatives to sewer service is discussed in its capital facilities element, the County's capital facilities element for sewer service does not comply with RCW 36.70A.110(4), RCW 36.70A.070, and RCW 36.70A.020(2).

B. Storm Drainage Financing Plan

Issue Two: Does the County's capital facilities element include a six-year financing plan for its storm drainage facilities for the Eastsound UGA in order to comply with RCW 36.70A.070 (3)(a) – (d) and RCW 36.70A.020(12)?

The June 20, 2006 Compliance Order/Final Decision Order found,

> …the County's capital facilities element for storm drainage facilities does not comply with RCW 36.70A.070 (a)–(d) until it is incorporated into the County's comprehensive plan and contains a six-year financing plan that identifies funding capacities and sources of public funding. Additionally, the storm drainage plan

[42] See Final Decision and Order/Compliance Order – Lopez Island UGA (April 2006) at 17.

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> needs to show how storm drainage facilities will be provided over the 20-year planning period to comply with RCW 36.70A.110(3) and RCW 36.70A.020(12).[43]

Ordinance 33-2008 adopts a 20-year storm drainage plan for the Eastsound UGA as part of the San Juan Comprehensive Plan.[44] The storm drainage plan includes an inventory and locations of existing facilities and proposed locations and capacities of needed facilities over the 20-year life of the plan[45], a six year financing plan[46], and a plan to fund the 20-year storm drainage plan projects[47]. This plan represents an impressive effort for a small, rural county.

Petitioners raise no objections to a finding of compliance.

***Conclusion**:* The adoption of the Long Range Drainage Plan Proposal for the Eastsound Village UGA by Ordinance 33-2008 as part of San Juan County's Comprehensive Plan brings the capital facilities plan for storm drainage facilities for the Eastsound UGA into compliance with RCW 36.70A.070 (3)(a) – (d) and RCW 36.70A.020(12).

C. Less than Urban Densities in the UGA

Issue Four: Are the areas within the UGA zoned for less than urban densities based on the local circumstances that warrant such lower densities in order to comply with RCW 36.70A.020 (1) (2) and RCW 36.70A.110(1)?

The June 20, 2006 Final Decision and Order/Compliance Order found,

> The record does not show, or has the County claimed that local circumstances dictate a need for suburban zoning for properties designated Eastsound residential – one unit per acre or Eastsound – two units per acre. Under these circumstances this designation is not an appropriate density for a UGA.[48]

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[43] Final Decision and Order/Compliance Order at 12.
[44] Record at 00563.
[45] Record at 000621, 000628 – 000641.
[46] Record at 000666.
[47] Record at 000667.
[48] Final Decision and Order/Compliance Order at 21.

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Resolution 42-2008 adopted the analysis in the April 15, 2008 Staff Report that concluded the properties shown on the Eastsound UGA official maps designated at suburban densities are existing parcels on or near shorelines.[49] The Record shows these parcels are affected by wetlands, steep slopes, poor soils, flood zones, and archaeological sites. [50] Additionally, sewer service will be provided to these areas during the 20-year planning period. [51]

Petitioners do not object to a finding of compliance.

Conclusion: The findings in Resolution 42-2008 are supported by the analysis in the April 15, 2008 staff report. The analysis describes the local circumstances that support zoning at less than urban densities in the Eastsound UGA. Based on the County's analysis, the zoning for these areas in the UGA now comply with RCW 36.70A.020(1) and (2) and RCW 36.70A.110(1).

D. Land Supply Analysis

Issue Three: Has the County's "shown its work" for the Eastsound UGA's commercial and institutional needs and adequately analyzed the needed land for commercial and institutional uses to cause the boundaries in order to comply with RCW 36.70A.110(2) and RCW 36.70A.115?

The Board's June 20, 2006 Compliance Order found,

> The County has not "shown its work" that it has assessed the commercial and institutional needs of the Eastsound UGA or that it has adequately analyzed land supply to meet these needs of the Eastsound UGA's future residents. Therefore, in light of the entire record, the land capacity analysis of the Eastsound UGA's future commercial and institutional needs does not comply with RCW 36.70A.110(2) and RCW 36.70A.115. [52]

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[49] Record at 000422.
[50] Record at 000441 to 000444.
[51] Record at 000443.
[52] Id. at Final Decision and Order/Compliance Order at 17.

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Positions of the Parties

County's Land Supply Analysis

The County estimates that the population of Orcas Island is expected to grow by 1,913 persons to a population of 6,869 by 2020. The County plans to accommodate 50 percent of that growth in the Eastsound UGA, or about 956 people. Based on average household size of 2.13 people, the UGA needs to accommodate about 449 dwelling units.[53] The County included a 25 percent market factor and a 25 percent seasonal home factor in determining its land supply. The County used the market factor to account for land that won't come on the market or be available for development and the seasonal home factor as the number of housing units that would not be available to permanent year round residents. The County based the seasonal home factor on the 2000 census accounts that showed 25 percent of Orcas Island's housing stock is seasonal housing. The combination of market and seasonal home market factor increases the UGA's need for sufficient land to accommodate 673 homes. [54]

The County also projected that while most current institutional uses could expand on their current sites, another 3.4 acres of land would be occupied by institutional uses. [55] The County estimated the UGA would need 8.6 acres of land for commercial uses.[56]

The County made various assumptions about the developability of vacant and partially vacant parcels in the Eastsound UGA to determine the UGA's land supply. This analysis concluded that the County had land supply to accommodate 687dwelling units, with 20 of these being accommodated on VC zoned land, 16 acres of vacant commercial land, and that the institutional uses could be absorbed by the supply of land provided by the market

[53] Record at 000429.
[54] Record at 000430-31.
[55] Record at 000440.
[56] Record at 000443.

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and seasonal housing factors. [57]

Petitioners' Position

Petitioner Klein criticizes the County's assumptions and methods of determining land supply. Petitioner says it was erroneous for the County to assume that all the land supply in the Village Residential (VR) zone would be used for residential uses, as over the last 20 years 80 percent of the new growth on VR zoned land was used for institutional uses. Petitioner contends that the County's application of the market factor to account for available land to accommodate institutional uses misuses the market factor which should be reserved for land that is unlikely to be available to meet required needs and amounts to "double counting" when determining available land supply. According to Petitioner, because all the institutional uses have been built in the VR zone, land supply in the VR zone must be reduced by an area that would support 27 dwelling units, based on the County's calculation that the land will accommodate 8 units per acre, so that the residential land supply would accommodate only 660 units.[58] Petitioner further questions the devotion of the entire residential land supply in the VR zone to residential use because numerous lots in the VR zone now are occupied by commercial uses. [59]

Petitioner doubts the County assumptions that the Village Commercial zone which allows for residential uses will accommodate 20 units over the next 20 years when over the last 22 no residential units to his knowledge have been built in the VC zone.[60]

Petitioner also criticizes the County for not fully utilizing the assessor's records to analyze deed restrictions on various lots in the VR zone, which he asserts significantly reduce the supply of land. Petitioner concludes from his analysis that the County underestimated land

[57] Record at 000432, 000436, and 000440.
[58] Petitioners Brief Compliance hearing at 14.
[59] Petitioner's Brief Compliance Hearing at 13, 16 and 17.
[60] Id. at 19.

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supply by at least another 44 dwelling units[61] Because Petitioner did not present these documents to the County, so that it could respond, the Board will not consider this information. [62]

Petitioner Campbell argues that if the County is correct that the VC zone is adequate for planned commercial and institutional growth, these uses should be eliminated from the VR zone. Petitioner maintains these lands are critical to providing enough residential land, especially land for affordable housing.[63]

County's Response

The County responds that the market factor used by the County "provides for the possibility that the land will be held off the market or that some residential and commercial properties would be developed with other uses". The County says it recognized that some mechanism must be used to account for the fact that land use districts in the UGA allow for a variety of uses and the County chose the market factor to do this. The County maintains this method addresses the local circumstances in the UGA and is within the County's discretion. According to the County, the market factor is large enough to account for the possible development of nonresidential uses in the VR zone and noncommercial uses in the VC zone while ensuring ample land supply for residential and commercial uses.[64]

The County explains that if all the institutional and commercial growth occurs in the VR zone, a total of 12 acres, that would leave additional land in the VC zone for residential development. Likewise, if all the 3.4 acres of projected institutional growth takes place in the VC zone, it would still leave enough land for projected commercial growth.[65] Additionally, in the VC zone, the County acknowledges that most of the property will be

[61] Id. at 15,16,and 18.
[62] See Preliminary Matters at 7 Supra.
[63] Petitioner's Brief at 2 and 3.
[64] San Juan County Response to Objections to a Finding of Compliance at 19.
[65] Id. at 20.

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used for commercial purposes and only assigns 20 dwelling units to the VC zone.

Board Discussion

The following parts of the GMA apply to this issue:

RCW 36.70A.110(2) states (in pertinent part),

> Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period…
>
> …An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.

RCW 36.70A.115 states,

> Counties and cities that are required or choose to plan under RCW 36.70A.040 shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management.

To determine if a UGA has sufficient land to accommodate urban growth, a land capacity analysis is necessary. The Board has characterized the land capacity in this way:

> It is prospective – looking forward over the coming 20 years to see if there is enough land within the UGA to accommodate the growth that has been allocated to the area. However, part of this determination of how much land is available is filled with assumptions or "educated guesses" that lack absolute certainty….
>
> This lack of precision permeates the entire process because the assumptions are largely qualitative, reach into the distant future, and reasonable people can disagree about them.[66]

[66] *Petree v. Whatcom County*, WWGMHB Case No.08-2-0021c (Final Decision and Order, October 13, 2008) at 27.

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The Board agrees with Petitioner Klein that while the Board's analysis specifically mentioned concerns about the County's past analysis of commercial and institutional uses, it was appropriate for the County to update its land capacity analysis because of the interrelationships of commercial, institutional, and residential uses due to proximity and the uses allowed in residential and commercial districts. [67] For this reason, the Board needs to evaluate the County's residential land capacity as well as commercial and institutional land capacity.

One of San Juan County's land capacity assumptions Petitioner Klein challenges is the capacity of the VR zone to accommodate the amount of dwelling units assigned to it in the land capacity analysis. Petitioner's challenge is based on the assumption that this zone will be entirely devoted to residential use even though the zoning code allows commercial and institutional uses and in the past, the majority of growth in institutional uses has taken place there as well as numerous commercial uses. The County accounts for future absorption of the VR zoned land by institutional uses by reasoning that the extra land provided by the market and seasonal housing factor will provide for that demand. Neither the County nor Petitioner Klein provided an assumption for how much VR zoned land will be absorbed by commercial uses. The County does say that if commercial uses all locate in the VR zone, then the VC zone that allows for residential uses will be available for residential uses. Petitioner Klein also objects to the County's use of the additional land provided by the market factor to account for institutional land.

While land use assumptions are "educated guesses" on which reasonable people can disagree, the Board agrees with Petitioner Klein that given past history, commercial uses will most likely continue to take up some of the land in the VR zone. However, the Board disagrees that additional land supply provided by the market factor cannot be used to account for institutional land. RCW 36.70A.110(2) requires that the County "shall include

[67] Petitioner's Brief Compliance Hearing at 12.

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areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period…" According to the County's land capacity analysis all the County actually needs to provide is 449 dwelling units to accommodate its projected growth.

RCW 36.70A.110(2) also allows that "An urban growth area determination *may* include a reasonable land market supply factor". (emphasis added). The Board reads this to mean that while the County can provide for additional land over and above what the County's land capacity analysis says it actually needs to provide for sufficient land to accommodate its projected population, the use of a market factor is not required. San Juan County says it has provided for a 25 percent market factor, which it characterizes as "a typical value for a market factor used in many communities in the state" and 25 per cent seasonal home factor, which, for the purpose of a land capacity analysis actually add ups to a 50 percent market factor. [68] Petitioner has not challenged the size of the market or seasonal home factor. Using the market factor to account for institutional uses has the effect of reducing the market factor. While a market factor is a useful tool in ensuring adequate land supply over the 20-year life of the plan, it is not required. Thus, the Board does not find it clearly erroneous for San Juan County to reduce the market factor to account for institutional land.

Likewise, it would not be clearly erroneous for the County to reduce the market factor to account for commercial land that might occupy VR zoned land. The County counters Petitioner Klein's objection to the lack of assumption for how much VR land will be absorbed by commercial uses by contending that if all of the 8.6 acres of projected commercial uses occurs on VR land, enough land will be left in the VC zoned land for residential uses. Without providing the Board with any actual land costs to support his assumption that VC

[68] Record at 000400. Until the Supreme Court's decision in *Thurston County v. Western Washington Growth Management Hearings Board*, the Growth Management Hearings Board held that 25 percent was a reasonable market factor. The Supreme Court ruled in that case that the Boards could not establish a bright line for a market factor and the market factor should be based on local circumstances.

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zoned land will always cost more than VR zoned land, Petitioner Klein contends that the price of VC zoned land has caused commercial uses to locate in the VR zone and that will deter residences from locating in the VC zone, as evidenced by the lack of residences there now. While Petitioner Klein has not provided the Board with an assumption or the basis for an assumption of how much VR land will be taken up with commercial uses, based on past history, the Board agrees that it is likely some new commercial uses would occupy VR zoned land.

While it may be likely that commercial uses will occupy VR zoned land, the resulting loss of residential land may be accommodated due to the County's use of both a market factor and a seasonal home factor. Furthermore, there is no data in the record showing what the past percentage of commercial uses on VR zoned land is, or an educated assumption for the amount of commercial uses occupying VR zoned land. As for the other County assumptions, the Board also finds it reasonable for the County to assume that 20 residential units over the planning period will be located on VC zoned land as mixed use areas are now being seen as desirable places to live. Second story residences over commercial and apartments in the VC zone could be affordable. The Board finds it reasonable for the County to use a seasonal home factor on a sought after recreational area like Orcas Island to provide for additional land capacity. However, the County bases this on the 2000 census that showed 25 percent of the housing units on Orcas Island were seasonal housing. The Board considers that it is probably unlikely that all of these seasonal homes would be located in the Eastsound UGA. Therefore, using a 25 percent seasonal home factor for the UGA most likely provides for more capacity for this type of housing than is needed and could provide the extra capacity necessary for permanent year-round housing.

As for Petitioner Campbell's contention that the County should be compelled to bar commercial and institutional uses from the VR zone, the Board finds that while the County must accommodate its projected residential growth, how its regulations provide for it is

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within the County's discretion. Barring commercial and institutional uses from the VR zone also would ignore the historical mixed use village nature of this zone and the trend in zoning to not separate commercial and residential uses. The Board is sympathetic to Petitioner Campbell's desire to provide cheaper land for affordable housing, but the issue before us is whether the County has provided adequate land supply in the UGA within the parameters of the GMA that includes consideration of local circumstances and the discretion afforded to the County to make choices on how to accommodate growth.

Conclusion: The County is obligated to provide sufficient land to accommodate its projected growth which is land for 449 housing units, 8.6 acres of land for commercial uses, and 3.4 acres for institutional uses. The County estimated the UGA could provide for 687 dwelling units. This would be somewhat in excess of 673 dwelling units that would be needed to provide for the County's 2020 population as well as a 25 percent market and a 25 percent seasonal home factor. The County's methodology actually reduced this market factor for its residentially zoned land to provide for institutional uses on residentially zoned land. This market factor will likely be reduced further due to the likelihood that the County allows for commercial uses in residential zones and past history of those uses occupying some residential land. However, even assuming all new commercial and institutional uses will occupy VR-zoned, it appears that the UGA can accommodate its projected residential, commercial, and institutional growth with a smaller market factor than the County has employed. Nevertheless, since the GMA does not require use of a market factor and due to local circumstances of village zoning that mixes residential, commercial, and institutional uses in its VR and VC zones, the Board does not find it clearly erroneous to allow the market factor to account for the uncertainty and lack of precision of determining where uses will eventually locate in the future. Therefore, the Board finds that in light of the entire record, the land capacity analysis for Eastsound UGA's commercial, institutional, and residential uses is not a clearly erroneous violation of RCW 36.70A.110(2) and RCW 36.70A.115.

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E. Issues That Are Not Before the Board on Compliance

Issue 7: Does the Eastsound UGA provide for affordable housing?

Issue 8: Does the Eastsound UGA provide for enough industrial land?

Issue 9: Does the Eastsound UGA's capital facilities plan provide for adequate water service to the UGA?

Both Petitioners Klein and Campbell argue that the land capacity analysis does not address affordability.[69] Petitioner Campbell alleges that the land capacity analysis does not provide an analysis of whether there is adequate land for industrial/commercial uses in the Eastsound UGA such as aircraft and auto related, construction related, and equipment repair due to the location in an Industrial Service Zone surrounded by residential uses.[70] Petitioner Austin points out that the Eastsound Water Supply Report and Recommendations and abbreviated Coordinated Water system Plan (sic) was not included in the record. Petitioner alleges that this report does not include a financing plan and lists numerous supply and contamination problems in Eastsound.[71]

The June 20, 2006 Final Decision and Order/Compliance Order did not find noncompliance on any of these issues, therefore these issues are not before the Board for compliance. For the Board to address these issues, Petitioners needed to file a new petition. Petitioners have not done so, so these issues are not before the Board to decide.

Conclusion: The issues of whether the Eastsound UGA provides for affordable housing, adequate water supply, and adequate water service are not before the Board on compliance and have not be raised in a Petition for Review, therefore the Board has no jurisdiction over these issues pursuant to RCW 36.70A.330[72].

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[69] Petitioner's Brief Compliance Hearing at 18 and 19. Petitioner's Brief at 1 and 2.
[70] Petitioner's brief at 1.
[71] Objections to a Finding of Compliance at 1.
[72] See *Port Townsend v. Jefferson County*, WWGMHB 94-2-0006(Compliance Order, December 12, 1994).

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F. Invalidity

Petitioner requests that the Board impose an order of invalidity on the Eastsound UGA due to the County's long-term failure to reach compliance and lack of progress toward coordinated and consistent boundaries for the UGA and the delivery of urban services. [73]

The County responds that Petitioner has not identified what part of the plan or regulation on which invalidity should be imposed. The County states it has brought the UGA into compliance so invalidity cannot be imposed.[74]

Board Discussion

While the Board has ruled that long-term failure to meet schedules of compliance could result in a finding of invalidity, the Board has also ruled: "… invalidity should be imposed if continued validity of noncompliant regulations would substantially interfere with the local jurisdiction's ability to engage in GMA compliant-planning". *Futurewise v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and Order, February 12, 2004). Also see *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c (Order Finding Noncompliance and Invalidity, February 2, 2004).[75] In this order, the Board has found compliance on all issues except one, albeit a very serious issue. The Board found that the Eastsound UGA's sewer capital facilities plan shows that it plans to extend sewers outside the UGA to areas that have not been documented as a health hazard or designated as a LAMIRD.

The County asserts that it issued 21 building permits on existing lots of less than five acres outside the UGA.[76] The District's records show that it has made four connections to sewer outside the UGA since October 25, 2005.[77] The County declares that only one of the building permits for existing lots outside the UGA indicated a sewer connection. The Board

[73] Petitioner's Brief Compliance Hearing at 24.
[74] San Juan County's Response to Objections to a Finding of Compliance at 23.
[75] Final Decision and Order/Compliance Order at 30.
[76] County's Supplemental Authorities at 4.
[77] County's Supplemental Authorities at 4, Exhibit B.

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is concerned that a small number of sewer connections have occurred outside the UGA since the adoption of Ordinance 13-2005 that adopted the current boundaries of the UGA in an apparent violation of SCC 18.60.250(D)(1). Nevertheless, a violation of enforcement of the County's development regulations is a matter for the courts.

With the incorporation of the Eastsound's sewer capital facilities plan into the Comprehensive Plan, the plan now shows that sewer service can be provided to the UGA in compliance with RCW 36.70A.070(3)(d) and RCW 36.70A.110(3).

The noncompliant sewer extensions outside the UGA are slated for 2014-2015. Therefore, although noncompliant, their presence in the Comprehensive Plan does not pose a threat to proper GMA planning at this time and the County has time to amend its capital facilities' element before these extensions are scheduled to occur.

***Conclusion*:** Based on the foregoing, the Board declines to impose invalidity at this time.

VII. FINDINGS OF FACT

1. San Juan County is located west of the crest of the Cascade Mountains and plans in accordance with RCW 36.70A.040.
2. Petitioners Fred Klein, John Campbell, and Dorothy Austin filed a petition in at least one of these cases that are being heard together.
3. The June 20, 2006 Final Decision and Order/Compliance Order found that San Juan County's designation of the 2005 Eastsound UGA was not compliant for the following reasons: (1) failure to incorporate financing plans for sewer and storm drainage facilities in the County's six-year capital facilities plan, (2) "failure to show its work" for commercial and institutional uses and adequately analyze the need for commercial and institutional land, (3) zoning areas within the UGA at less than urban densities without showing the local circumstances that warrant these lower densities, and (4) failure of the capital facilities element to show that urban levels

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of service are planned within the entire UGA in the 20-year planning period. That Order also found that the County's designation of the Eastsound UGA ~~also~~ was noncompliant because it did not have a capital facilities plan that showed that sewer service could be delivered to all parts of the UGA in violation of RCW 36.70A.110(3) and (4) and RCW 36.70A.020(2).

4. Ordinance 39-2008 amended San Juan County's Comprehensive Plan to incorporate by reference the Eastsound Water and Sewer District's (District) 2008 Update of 2003-2023 General Sewer Plan.
5. The District's sewer capital facilities plan now includes an inventory of existing sewer capital facilities, a forecast of future needs and the proposed locations of new facilities to support the entire UGA and a six-year capital facility financing plan. The referenced sewer plan also shows how sewers will be financed over the 20-year life of the plan.
6. An issue in the compliance order and before the Board now is how does the County intend to have sewer services provided to the Eastsound UGA in a compliant manner.
7. RCW 57.16.010 outlines the process for adoption of comprehensive plans and amendments to these plans of sewer and water districts. This process includes approval of the sewer comprehensive plan by the County and specifically requires that the "comprehensive plan shall not provide for the extension or location of facilities that are inconsistent with the requirements of RCW 36.70A.110".
8. The 2001 Eastsound Sewer District Certificate of Need states that Ecology's approval does not relieve the District from complying with other state and local statutes.
9. SCC 18.60.250(D)(1) prohibits urban level facilities and services outside of UGAs, Master Planned Resorts, or LAMIRDs that had not been completed, were being constructed, or had completed planning or budgeting by January 1, 2001.

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10. The sewer extension on Bartel Road, which Petitioner says was constructed in the 1990s, was constructed before the boundaries of the UGA were reduced in 2005 and before the 200l date indicated in SCC 18.60.250(D)(1) so they would be considered existing facilities.
11. The District's Plan indicates the extension on Sunset Avenue was completed in 2006 after the UGA's reduction in 2006. There is no evidence in the record for the Board to evaluate ~~on~~ whether the County ignored SCC 18.60.250(D)(1) or that construction was underway before boundaries of the UGA were reduced for this sewer extension.
12. The District's map showing existing and proposed facilities show the Sunset Avenue extension outside the UGA as an existing facility and shows no further extension.
13. The District's 2014 -2023 Capital Facilities Plan shows that "improvements" to Sunset Avenue are to be funded as a "Developer Extension Agreement".
14. A November 12, 2008 District letter states the" improvements" to Sunset Avenue are not an extension.
15. The long proposed sewer extension along Mount Baker Road and Terrills Beach Road extending far from the UGA boundaries is proposed to serve Country Corner, an area the County is considering designating a LAMIRD and which the District says contains development that is a threat to the Eastsound aquifer.
16. Ordinance 33-2008 adopts a 20-year storm drainage plan for the Eastsound UGA as part of the San Juan Comprehensive Plan that includes an inventory and locations of existing facilities and proposed locations and capacities of needed facilities over the 20-year life of the plan, a six year financing plan, and a plan to fund the 20-year storm drainage plan projects.

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17. Resolution 42-2008 adopted the analysis in the April 15, 2008 Staff Report that concluded the properties shown on the Eastsound UGA official maps designated at suburban densities are existing parcels on or near shorelines.
18. The Record shows the parcels in areas zoned for less than urban densities are affected by wetlands, steep slopes, poor soils, flood zones, and archaeological sites. Additionally, sewer service will be provided to these areas during the 20-year planning period.
19. The County plans to accommodate 50 percent of Orcas Island's population growth in the Eastsound UGA, or about 956 people. Based on the average household size of 2.13 people, the UGA needs to accommodate about 449 dwelling units.
20. The County included a 25 percent market factor and a 25 percent seasonal home factor in determining its land supply.
21. The County based the seasonal market factor on the 2000 census accounts that showed 25 percent of Orcas Island's housing stock is seasonal housing.
22. The combination market and seasonal home factor increases the UGA's need for sufficient land to accommodate 673 homes.
23. The County ~~also~~ projected that while most current institutional uses could expand on their current sites, another 3.4 acres of land would be occupied by institutional uses.
24. The County estimated the UGA would need 8.6 acres of land for commercial uses.
25. The County's land supply analysis concluded that there was enough land in the Eastsound UGA to accommodate 687 dwelling units, with 20 of these being accommodated on VC zoned land, 16 acres of vacant commercial land, and that the institutional uses could be absorbed in the supply of land provided by the market and seasonal housing factors.

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26. The zoning code allows commercial and institutional uses in the VR zone and, in the past, the majority of growth in institutional uses has taken place there as well as numerous commercial uses.
27. The market factor and the amount of land available for residential use will likely be reduced further due to the likelihood the County allows for commercial uses in residential zones and past history of those uses occupying some VR zoned land.
28. Even assuming all new commercial and institutional uses will occupy VR zoned land, it appears that the UGA can accommodate its projected residential, commercial, and institutional growth with a smaller market factor than the County assumed in its land capacity analysis.
29. The issue of whether designation of the Eastsound UGA provides for affordable housing is not before the Board for compliance.
30. The Board's June 20, 2006 Final Decision and Order/Compliance Order did not find the land supply for industrial uses noncompliant.
31. The June 20, 2006 Final Decision and Order/Compliance Order did not address the adequacy of the Eastsound UGA's capital facilities for supplying and delivering water.
32. The noncompliant sewer extensions outside the UGA are slated for 2014-2015.
33. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.

VIII. CONCLUSIONS OF LAW

A. The Board has jurisdiction over the parties and the subject matter of these cases.

B. Petitioners Klein, Campbell, and Austin have standing to participate in these compliance proceedings.

C. The District's Sewer 2008 Update of 2003-2023 General Sewer Plan adopted by reference into the County's Comprehensive Plan now complies with RCW 36.70A.070(3)(a) –(d), RCW 36.70A.110(3), and RCW 36.70A.020(12).

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D. Petitioner did not have to file a new petition to challenge the capital facilities element to raise objections concerning the consistency of the District's sewer plan with the land use element.

E. While the Board has no jurisdiction over County approval of the District's Plan pursuant to RCW 57.16.10, it does have jurisdiction to determine whether the County Comprehensive Plan's capital facilities element which now includes the District's sewer plan, complies with the GMA pursuant to RCW 36.70A.280(1).

F. By including in its Comprehensive Plan the District Plan's proposed sewer extensions outside the UGA to a nonexistent LAMIRD, including to an area where no documented health hazard exists, and to where no investigation of other alternatives to sewer service is discussed in its capital facilities element, the County's capital facilities element for sewer service does not comply with RCW 36.70A.110(4), RCW 36.70A.070, and RCW 36.70A.020(2).

G. The adoption of the Long Range Drainage Plan Proposal for the Eastsound Village UGA by Ordinance 33-2008 as part of San Juan County's Comprehensive Plan brings the capital facilities plan for storm drainage facilities for the Eastsound UGA into compliance with RCW 36.70A.070 (3)(a) – (d) and RCW 36.70A.020(12).

H. The zoning for areas containing less than urban densities in the UGA comply with RCW 36.70A.020(1) and (2) and RCW 36.70A.110(1).

I. RCW 36.70A.110(2) does not require use of a market factor.

J. It is not a clearly erroneous violation of RCW 36.70A.110(2) to allow the market factor to account for the uncertainty and lack of precision of determining where uses will eventually locate in Eastsound UGA .

K. In light of the entire record, the land capacity analysis for Eastsound UGA's commercial, institutional, and residential uses is not a clearly erroneous violation of RCW 36.70A.110(2).

L. The Board's May 7, 2001 Compliance Order in this case found the housing element

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compliant. Adoption of Resolution 42-2008 did not revise the housing element and open it to challenge.

M. The issues of whether the designation of the Eastsound UGA provides for adequate affordable housing and industrial land supply and its water system complies with the GMA are not before the Board for compliance, so were not considered in this order pursuant to RCW 36.70A.330.

N. Although noncompliant, the presence in the Comprehensive Plan of sewer Lines outside the UGA does not substantially pose a threat to proper GMA planning at this time.

O. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.

IX. ORDER

San Juan County must take legislative action to bring the capital facilities element of its Comprehensive Plan regarding sewer service for the Eastsound UGA into compliance within 180 days in accordance with the following schedule:

Item	Date Due
Compliance Due	August 6, 2009
Compliance Report and Index to the Record Due	August 17, 2009
Objections to a Finding of Compliance Due	August 31, 2009
Response to Objections Due	September 14, 2009
Compliance Hearing	September 22, 2009

Dated this 30th day of January, 2009.

_____
Holly Gadbaw, Board Member

_____
James McNamara, Board Member

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_____
William H. Roehl, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

<u>Reconsideration</u>. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. <u>Filing means actual receipt of the document at the Board office.</u> RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

<u>Judicial Review</u>. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means <u>actual receipt of the document at the Board office</u> within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

<u>Service</u>. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

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