

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 OVERTON ASSOCIATES, et al.,

4
5 Petitioners,

6 v.

CASE NO. 05-2-0009c

7
8 MASON COUNTY,

9 Respondent,

**FINAL DECISION AND
ORDER ON NON-BELFAIR
ISSUES**

10
11 And

12 JACK NICKLAUS, BRIAN PETERSEN, and LES
13 KRUEGER,

14
15 Intervenor.

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18 **I. SYNOPSIS OF DECISION**

19 In this case, we are asked to determine whether the County's adoption of two ordinances
20 amending development regulations comply with the GMA requirements regarding protection
21 of critical areas, best available science, and special consideration for anadromous fisheries.
22 In addition, we are asked to consider two failure to act claims: one regarding development
23 regulations to implement the Harstine Island Sub-Area Plan; and the other concerning
24 development regulations to implement identified open space corridors between the UGAs.
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27 In reviewing the arguments and record in this case, we are persuaded that the Board does
28 not have jurisdiction over the failure to act claims. At the time that the County adopted its
29 comprehensive plan, it also adopted development regulations to implement that plan. A
30 challenge to the failure to adopt development regulations that implement the Harstine Island
31 Sub-Area Plan and the County's open space corridor identification is a challenge to the
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1 sufficiency of those development regulations, rather than a failure to act challenge. The
2 County acted in 1996 to adopt a set of development regulations to implement its 1996
3 comprehensive plan. Subsequent amendments to the plan are subject to those
4 development regulations so any challenge to the sufficiency of those development
5 regulations to implement amendments to the comprehensive plan should be brought within
6 60 days of publication of the County's adoption of a comprehensive plan amendment.
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9 We also find that the Petitioners' failure to correct the issue statement in the prehearing
10 order precludes them from arguing those issues. Where the prehearing order specifically
11 requires the parties to file any corrections to the issue statement within a deadline, the
12 statutory requirement that the Board only decide issues set forth in the petitions for review
13 *as modified by any prehearing order* (RCW 36.70A.290(1)) forecloses board review of the
14 issues not listed in the prehearing order. We do not, therefore, decide the issues related to
15 Ordinance 106-04.
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18 We find the changes to the development regulations pertaining to non-conforming uses did
19 not open the issue for challenge raised by the petitioners – substitution of uses within the
20 non-conforming use category – since that section of the development regulations was
21 unchanged by the amendment.
22

23
24 The challenged amendments to the Natural Resource Ordinance to protect critical areas
25 enacted small changes to the County's protections for fish and wildlife habitat conservation
26 areas (FWHCAs). Following the suggestion of both parties, the Board finds that inclusion
27 and consideration of best available science for these amendments should be
28 commensurate with the degree of change under consideration. In this case, the
29 amendments to the Mason County Resource Ordinances were minimal. The Board finds
30 that the County included best available science by reference to the best available science
31 utilized in the initial adoption of the regulations, subjected to expert assessment by a wildlife
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1 biologist. Under these facts, the County's record demonstrates a sufficient inclusion of best
2 available science. The County is in compliance with the Act's requirements to include best
3 available science and gave appropriate consideration to anadromous fisheries.
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5 II. PROCEDURAL HISTORY

6 This case is a consolidation of two petitions for review. The first, *Advocates for Responsible*
7 *Development and John E. Diehl v. Mason County*, was filed on January 25, 2005, and
8 assigned WWGMHB Case No. 05-2-0003. A prehearing order was entered in WWGMHB
9 Case No. 05-2-0003 on March 9, 2005. The second, *Overton and Associates, Northbay*
10 *Properties, Coulter Creek, North Mason, Southwest Kitsap, and David Overton v. Mason*
11 *County*, was filed on February 25, 2005, and assigned WWGMHB Case No. 05-2-0009.

12 The cases were consolidated upon the unopposed motion of Mason County on March 24,
13 2005, and are now under the single WWGMHB Case No. 05-2-0009c. Order Consolidating
14 Cases, March 24, 2005.¹
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18 This order addresses the non-Belfair issues in the consolidated petitions for review, as set
19 out in the June 10, 2005, prehearing order. Prehearing Order and Order Extending
20 Deadline for Final Decision and Order (June 10, 2005). The non-Belfair issues fall into three
21 categories: failure to act challenges; challenges to Ordinance 106-04; and challenges to
22 Ordinance 128-04.
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24
25 Petitioners filed their petition for review by facsimile. It was assigned WWGMHB Case No.
26 05-2-0003. In that petition, Petitioners raised challenges to three ordinances: Ordinance
27 106-04, published on November 25, 2005; Ordinance 128-04, adopted December 14, 2004;
28 and Ordinance 133-04, adopted December 28, 2004. The Board originally dismissed the
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31 ¹ Brian Petersen, Jack Nicklaus, and Lis Krueger were granted leave to intervene, and their motions were
32 consolidated into WWGMHB Case No. 05-2-0009c on April 13, 2005. Order Granting Intervention.

1 issues related to Ordinance 106-04 because the petition was not received by the Board
2 within 60 days of publication of the adoption of the ordinance. Petitioners moved for
3 reconsideration, asserting that Mr. Diehl had confirmed receipt of the petition for review by
4 telephone conversation with an unknown female before the close of business on
5 January 24, 2005. Although the Board's only staff member did not receive the facsimile
6 until the next morning, the Board reinstated the Petitioners' claims as to Ordinance 106-04
7 because the Board did not retain a copy of the fax receipt. Order Granting Reconsideration
8 and Vacating Order of Dismissal, April 1, 2005.
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10
11 Petitioners filed a dispositive motion on April 21, 2005. The Board declined to decide the
12 issues on motions and held them over to a full hearing on the merits. Order Denying
13 Dispositive Motion (May 11, 2005).
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16 Prior to consolidation of the Petitioners' petition for review with the Overton Associates'
17 petition for review, the Board entered a prehearing order setting a briefing and hearing
18 schedule in WWGMHB Case No. 05-2-0003. Prehearing Order (March 9, 2005).² Overton
19 Associates and the County requested an extension of the decision deadline in order to
20 engage in settlement discussions on the issues related to Ordinance 133-04, the Belfair
21 UGA. On April 27, 2005, the Board separated the issues for resolution in the case as "non-
22 Belfair UGA issues" and "Belfair UGA issues" and extended the deadline for decision as to
23 the Belfair UGA issues. Order Extending Final Decision and Order Deadline and
24 Segmenting the Adjudication. In that order, the Board confirmed the hearing date already
25 set as to the non-Belfair UGA issues (July 7, 2005), and the deadline for final decision and
26 order of August 25, 2005. The Board also established a new hearing date of October 11,
27 2005, and a new deadline for final decision and order on the Belfair UGA issues of
28 November 22, 2005. However, no scheduling order was issued subsequent to the
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32 ² The March 9, 2005, Prehearing Order did not include the issues relating to Ordinance 106-04 because at that
time, those issues had been dismissed.

1 consolidation of these cases and the prehearing order in WWGMHB Case No. 05-2-0003
2 remained the only order in effect for scheduling purposes. Under this order, Petitioners'
3 brief for the July 7, 2005, hearing on the merits was due May 24, 2005. On May 31, 2004,
4 Petitioners Diehl and Advocates for Responsible Development filed a motion for clarification
5 of the briefing schedule and requested a new briefing schedule. The Petitioners' brief as to
6 the non-Belfair UGA issues was not filed in accordance with the prehearing order issued in
7 Case No. 05-2-0003 and a second prehearing conference was held to address the problem.
8 On June 9, 2005, new dates for briefing and hearing were set. Petitioners Diehl and
9 Advocates for Responsible Development withdrew their objection to the extension of
10 decision deadline as to the Belfair UGA issues and a new briefing schedule for the non-
11 Belfair issues was established. The new schedule for this case, on two tracks, was
12 established in the prehearing order issued in WWGMHB Case No. 05-2-0009c on June 10,
13 2005. Prehearing Order and Order Extending Deadline for Final Decision and Order.
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17 The June 10, 2005, prehearing order also set out the statement of issues for both tracks. It
18 provided:

19 ***If any party objects to any portion of this issue statement, that party must file a***
20 ***written motion for change together with the proposed changed issue or issues***
21 ***in their entirety no later than June 17, 2005.***

22 Prehearing Order and Order Extending Deadline for Final Decision and Order (June 10,
23 2005). (bolding and italicization in the original).

24 No objections or changes were filed.

25
26 Pursuant to the June 10 prehearing order, Petitioners' brief was due July 11, 2005. On
27 July 8, Petitioners filed a request for extension of time for filing of their brief because of a
28 computer "crash" ten days earlier. Motion for Extension of Time. No extension of time was
29 granted. Petitioners filed their brief on July 13, 2005.
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1 Petitioners filed a Motion for Supplemental Evidence on June 13, 2005. That motion was
2 partially granted by the Board. Order on Motion to Supplement the Record (July 6, 2005).

3
4 On July 29, 2005, the County also filed a motion for extension of time. Motion for Extension
5 of Time to File Respondent's Brief. The County requested an additional 30 days to file its
6 brief, due to the departure from the Prosecutor's Office of the attorney who had been
7 handling Growth Management Act (GMA) matters. The Presiding Officer advised the
8 County by letter that the additional time could not be granted without an extension of the
9 decision deadline. Letter of July 30, 2005. The Petitioners opposed the extension. Diehl
10 Letter of August 1, 2005. The County did not file a brief prior to the hearing on the merits.
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13 The hearing on the merits was held in Shelton, Washington, on August 9, 2005. John Diehl
14 appeared for the Petitioners. Deputy prosecutor Michael Clift, Community Development
15 Department Director Robert Fink, and County Planner Allan Borden appeared for Mason
16 County. All three Board members were present. The County was granted leave to submit
17 its oral presentation as a brief post-hearing. Petitioners were granted the ability to respond
18 to the County's presentation by August 12, 2005. Additional exhibits were also allowed to
19 respond to Board questions. Both the County and the Petitioners filed post-hearing briefs
20 on August 12, 2005.³
21
22

23 III. ISSUES PRESENTED

24 The following are the issues set out for resolution in the prehearing order, June 10, 2005:⁴
25

26 _____
27 ³ The County's exhibits were not filed with the Board until the following week.

28 ⁴ The Challenges to Ordinance 106-04 were not included in the June 10, 2005, prehearing order statement of
29 issues. These were:

- 30 a) Whether the County failed to comply with the requirement to protect critical areas pursuant to
31 RCW 36.70A.060(2) by allowing the consolidation of existing structures into one footprint within
32 fish and wildlife habitat critical areas and their buffers, and allowing maintenance and use of
existing landscaped areas within the buffer area through the amendment of §17.01.110.F.

1 *Failure to act claims*

- 2 1. Whether the County failed to meet the goal to retain open space, RCW
3 36.70A.020(9), and the requirements of RCW 36.70A.040 and .160 and WAC 365-
4 195-420 by failing to act to reserve open space corridors connecting Urban Growth
5 Areas and failing to implement the part of its comprehensive plan relating to such
6 corridors.
- 7 2. Whether the County failed to meet the goals to reduce inappropriate conversion of
8 undeveloped land into sprawling, low density development, RCW 36.70A.020(2), to
9 retain open space and conserve fish and wildlife habitat, RCW 36.70A.020(9), and to
10 protect the environment, RCW 36.70A.020(10) and the requirements of RCW
11 36.70A.040 by failing to act to implement the Harstine Island sub-area plan
12 incorporated within its comprehensive plan.

13 *Challenges to Ordinance 128-04*

- 14 3. Whether Ordinance 128-04 fails to comply with the requirement to protect critical
15 areas pursuant to RCW 36.70A.060(2) by allowing, through amendment of
16 §17.01.110.G of the Resource Ordinance, new development in fish and wildlife
17 habitat conservation areas and their buffers associated with park or community
18 recreation development.
- 19 4. Whether the County failed to comply with the requirement to use best available
20 science pursuant to RCW 36.70A.172(1) by allowing approvals cited in issue 3.
- 21 5. Whether the County failed to comply with the requirement to give special
22 consideration to measures needed to preserve or enhance anadromous fisheries
23 pursuant to RCW 36.70A.172(1) by allowing approvals cited in issue 3.
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- 26 b) Whether the County failed to comply with requirement to use best available science and to give
27 special consideration to anadromous fisheries, pursuant to RCW 36.70A.172(1) by allowing
28 approvals cited in issue 3.
- 29 c) Whether the County failed to comply with the requirements to maintain rural residential densities,
30 pursuant to RCW 36.70A.060(1), (2), (8), and (9) by allowing for accessory dwelling units of up to
31 80% the habitable area of primary residence or 1,000 square feet, whichever is smaller, through
32 amendment of §1.03.029.

- 1 6. Whether Ordinance 128-04 fails to comply with the requirement to protect critical
2 areas pursuant to RCW 36.70A.060(2) by allowing substitution of nonconforming
3 uses of equal intensity within critical areas and their designated buffers through
4 amendment of §1.05.018.
- 5 7. Whether the County failed to comply with the requirement to include best available
6 science pursuant to RCW 36.70A.172(1) by allowing the action referenced in issue 6.
7
- 8 8. Whether the County failed to comply with the requirement to give special
9 consideration to measures needed to preserve or enhance anadromous fisheries
10 pursuant to RCW 36.70A.172(1) by allowing the action referenced in issue 6.

11 IV. BURDEN OF PROOF

12 For purposes of Board review of the comprehensive plans and development regulations
13 adopted by local government, the GMA establishes three major precepts: a presumption of
14 validity; a “clearly erroneous” standard of review; and a requirement of deference to the
15 decisions of local government.
16

17 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations, and
18 amendments to them are presumed valid upon adoption:
19

20 Except as provided in subsection (5) of this section, comprehensive plans and
21 development regulations, and amendments thereto, adopted under this chapter are
22 presumed valid upon adoption.
23 RCW 36.70A.320(1).
24

25 The statute further provides that the standard of review shall be whether the challenged
26 enactments are clearly erroneous:

27 The board shall find compliance unless it determines that the action by the state
28 agency, county, or city is clearly erroneous in view of the entire record before the
29 board and in light of the goals and requirements of this chapter.
30 RCW 36.70A.320(3).
31
32

1 In order to find the County's action clearly erroneous, the Board must be "left with the firm
2 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
3 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

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

6
7 In recognition of the broad range of discretion that may be exercised by counties and
8 cities in how they plan for growth, consistent with the requirements and goals of this
9 chapter, the legislature intends for the boards to grant deference to the counties and
10 cities in how they plan for growth, consistent with the requirements and goals of this
11 chapter. Local comprehensive plans and development regulations require counties
12 and cities to balance priorities and options for action in full consideration of local
13 circumstances. The legislature finds that while this chapter requires local planning to
14 take place within a framework of state goals and requirements, the ultimate burden
15 and responsibility for planning, harmonizing the planning goals of this chapter, and
16 implementing a county's or city's future rests with that community.

17 RCW 36.70A.3201 (in part).

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

23 V. DISCUSSION

24 A. Procedural Issues Before the Board

25 This case presents an extraordinary number of procedural violations. Petitioners Diehl and
26 Advocates for Responsible Development failed to timely file their opening brief, twice. The
27 County failed to file its hearing brief until after the hearing was conducted. Petitioners also
28 failed to correct the issue statement in the prehearing order of June 10, 2005, to include
29 claims concerning Ordinance 106-04, even though the prehearing order expressly required
30 any changes to be submitted in writing by June 17, 2005. Prehearing Order and Order
31
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1 Extending Deadline for Final Decision and Order (June 10, 2005). The County also filed its
2 post-hearing exhibits after the deadlines given for them.

3
4 At the hearing on the merits, Petitioners were asked why the Board should not dismiss their
5 petition for failure to follow the established briefing schedule. Petitioners argued that there
6 was no prejudice to the County by their failure to follow the schedule established for this
7 case. This misses one of the primary purposes of the schedules, namely to allow the Board
8 to do its work. The Board must issue its final decision on a petition for review within one
9 hundred and eighty days of the date of filing. RCW 36.70A.300(2)(a). In the event of a
10 case with consolidated petitions for review, the one hundred and eighty days runs from the
11 date of filing of the last petition that is consolidated. Ibid. Schedules are established early
12 in the proceedings. This ensures that all the relevant information may be presented to the
13 board so that the board members may review it adequately before the hearing on the merits
14 and pose appropriate questions to clarify any points being argued. Further, board decisions
15 often involve detailed reference to the record and analysis of local plans and regulations.
16 This, and the fact that a panel of three must reach a decision on all the issues presented,
17 means that the board also requires sufficient time after the hearing to write its final decision.
18 In this case, the Petitioners failed to file their opening brief in accordance with the
19 prehearing order of June 10, 2005, and the County also failed to file its hearing brief in
20 accordance with the established schedule. The Board, as a consequence, had an
21 incomplete picture of the arguments from both sides prior to the hearing on the merits.
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26 Petitioners filed a motion for extension of time to file their brief on July 8, 2005, the Friday
27 before the Monday the brief was due. This motion asserts that Mr. Diehl experienced a
28 computer crash 10 days prior and was therefore unable to file his brief until his new
29 computer arrived. The Board did not grant the requested extension. Asking the Board to
30 grant an extension to allow the purchase and delivery of a new computer over the course of
31 more than 10 days is simply not reasonable. Further, when the County also requested an
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1 extension because of a staffing shortage, Petitioners refused to join in a motion for
2 extension for settlement purposes, even when it was pointed out to Petitioners that the
3 consequence of their failure to timely file a brief was at issue. Letter from Presiding Officer,
4 August 1, 2005. Petitioners' responded:

5 Because in the present case, the non-Belfair issues are not unduly complicated, I am
6 sure that you can produce a brief and appear on August 9 if you set your mind to it.
7 Letter from Mr. Diehl to Mr. Clift, August 1, 2005.

8
9 Under the Board's rules, dismissal is appropriate if the parties fail to follow the Board's rules
10 or any order of the Board:

11 **Dismissal of action.** Any action may be dismissed by a board:

12 ...

13 (4) Upon a board's own motion for failure by the parties to comply with these rules or
14 any order of the board.
15 WAC 242-02-720.

16 While the Board would be within its discretion if it dismissed the petition in this case, the
17 Board will not exercise its discretion to dismiss the petition. The scheduling violations
18 occurred on both sides and both negatively impacted the Board. However, as a remedy,
19 dismissal of a petition only penalizes the petitioner. Although it is a close case, the Board
20 will not dismiss the petition for review.

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22
23 On the other hand, the Petitioners also have argued issues that are not contained in the
24 prehearing order statement of issues. Prehearing Order and Order Extending Deadline for
25 Final Decision and Order (June 10, 2005). The prehearing order issue statement does not
26 contain the challenges to Ordinance 106-04. In response to the Board's inquiry at the
27 hearing on the merits concerning the effect of the Petitioners' failure to correct the statement
28 of issues in the June 10, 2005, Prehearing Order, Petitioners pointed to the Order on Motion
29 to Supplement the Record of July 6, 2005. Because this order refers to the record re:
30 Ordinance 106-04, Petitioners argue, the Board must have been aware of these issues. By
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1 implication, Petitioners argue that if the Board was aware of the issues, they need not be set
2 out in the issue statement.

3
4 This argument is not persuasive. The statute limits the issues a board may decide: “The
5 board shall not issue advisory opinions on issues not present to the board in the statement
6 of issues, as modified by any prehearing order.” RCW 36.70A.290(1) (in pertinent part).

7
8 While it is true in this case that the Board did not intentionally omit any “non-Belfair” issues
9 from the issue statement, the obligation is on the parties to ensure that the issue statement
10 is correct. The June 10 prehearing order expressly placed the burden on the parties to
11 review and correct the issue statement:

12 ***If any party objects to any portion of this issue statement, that party must file a***
13 ***written motion for change together with the proposed changed issue or issues***
14 ***in their entirety no later than June 17, 2005***

15 Prehearing Order and Order Extending Deadline for Final Decision and Order (June 10,
16 2005). (bolding and italicization in the original).

17 Petitioners’ failure to do this is unexcused and the June 10 prehearing order binds the
18 parties to the statement of issues it contains.

19
20 **Conclusion:** The Board finds that the late filing of briefs and exhibits in this case is
21 unexcused but will not exercise its discretion to dismiss the petition for review. However,
22 the challenges related to Ordinance 106-04 are not contained in the issue statement in the
23 last prehearing order and are, therefore, not before the Board. RCW 36.70A.290(1).
24

25
26 B. Failure to Act Claims - Issues Nos. 1 and 2

- 27 1. Whether the County failed to meet the goal to retain open space, RCW
28 36.70A.020(9), and the requirements of RCW 36.70A.040 and .160 and WAC 365-
29 195-420 by failing to act to reserve open space corridors connecting Urban Growth
30 Areas and failing to implement the part of its comprehensive plan relating to such
31 corridors.
32 2. Whether the County failed to meet the goals to reduce inappropriate conversion of
undeveloped land into sprawling, low density development, RCW 36.70A.020(2), to

1 retain open space and conserve fish and wildlife habitat, RCW 36.70A.020(9), and to
2 protect the environment, RCW 36.70A.020(10) and the requirements of RCW
3 36.70A.040 by failing to act to implement the Harstine Island sub-area plan
4 incorporated within its comprehensive plan.

5 **Positions of the Parties:**

6 As to the failure to act claims, Petitioners assert that Mason County has failed to act to
7 adopt development regulations to implement both open space corridors and the Harstine
8 Island Subarea plan. Petitioners' Brief on Non-Belfair Issues at 2-5. Although the County
9 incorporated policies for Harstine Island in its comprehensive plan in 1996, Petitioners
10 argue that "these remain policies in name only, without any DRs [development regulations]
11 to implement them." Ibid at 2. The County adopted regulations to implement the plan on
12 June 25, 1996. Ordinance 82-96, Index 3001. Petitioners argue that the development
13 regulations were not intended to implement the Harstine Island portion of the
14 Comprehensive Plan. Petitioners' Brief on Non-Belfair Issues at 5.
15
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18 The County responds that, as the development regulations were adopted in mid-1996, the
19 time to challenge the sufficiency of those regulations is long past. Response to Mr. Diehl's
20 Dispositive Motion, May 2, 2005 (incorporated by reference in the County's brief). The
21 County argues that it has acted to implement development regulations, and Petitioners'
22 challenge is not truly for failure to act, but rather goes to the sufficiency of the County's
23 action. Ibid.
24

25
26 **Board Analysis:**

27 A failure to act claim is based on a procedural violation of the GMA requirements to act and
28 must be distinguished from a failure to act in substantive compliance with the GMA. *Kitsap*
29 *Citizens for Rural Preservation v. Kitsap County*, CPSGMHB Case No. 94-3-0005 (Order on
30 Dispositive Motion, July 27, 1994). Failure to act challenges are appropriate where a
31 County has not adopted a comprehensive plan or has not adopted any development
32 regulations to implement the plan. See, for example, *WEAN v. Island County*, WWGMHB

1 95-2-0063 (Order on Dispositive Motions, June 1, 1995). Once a county has adopted
2 development regulations to implement the plan, the challenge is no longer for failure to act
3 but to the sufficiency of that action.

4 Entitled an ordinance "establishing Development Regulations for Mason County," Ordinance
5 No. 82-96 provides that public hearings were held "on Development Regulations necessary
6 to implement the Mason County Comprehensive Plan, changes to existing county ordinance
7 necessary to bring them into consistency with the Comprehensive Plan" and "ADOPTS the
8 development regulations and amendments to Title 16 as amended" on June 25, 1996.

9 Index 3001. Thereby, the County acted in conformity with the procedural requirements of
10 the GMA to adopt development regulations to implement the 1996 comprehensive plan.
11

12
13 As to Issue 2 (development regulations to implement the Harstine Island Subarea Plan),
14 Petitioners concede that the comprehensive plan policies relevant to Harstine Island were
15 adopted in the 1996 comprehensive plan. Petitioners' Brief on Non-Belfair Issues at 2.
16 Even if the development regulations adopted in 1996 did not fully substantively implement
17 the Harstine Island Subarea plan, the failure to adopt such development regulations may
18 not be raised now as a "failure to act" claim. A challenge to the sufficiency of the
19 development regulations is not the same as a challenge for failure to act. Although couched
20 in terms of "failure to act," Petitioners' challenge is essentially a challenge to the adequacy
21 of the County's action.
22
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24
25 This is primarily significant because a failure to act challenge is not subject to the time for
26 filing petitions for review in RCW 36.70A.290(2). If the County had not taken any action,
27 then there would be no adoption or publication date to trigger the 60-day filing requirement.
28 However, since development regulations have been adopted, RCW 36.70A.290(2) applies
29 to set the time for filing a petition for review. The Board lacks authority to hear a challenge
30 to the sufficiency of the County's development regulations to implement the Harstine Island
31
32

1 comprehensive plan policies now, some nine years after the comprehensive plan policies
2 and implementing development regulations were adopted.

3
4 Petitioners argue that the County cannot legitimately claim a “stealth” adoption of
5 development regulations to implement policies on open space corridors and the Harstine
6 Island Sub Area Plan. Petitioners’ Reply Brief on Non-Belfair Issues at 2. Given the
7 recitation in Ordinance No. 82-96 that the development regulations were adopted to
8 implement the comprehensive plan, the assertion that the development regulations
9 implement the Harstine Island policies is hardly a “stealth” action. Index 3001. Since the
10 Harstine Island Subarea Plan was part of the comprehensive plan for which development
11 regulations were adopted in 1996, the Petitioners are raising a challenge to the sufficiency
12 of the development regulations, rather than a failure to act claim.
13
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15
16 As to Issue 1 (development regulations to implement open space corridors), the situation is
17 related. Petitioners’ challenge to the development regulations on these policies is also a
18 challenge to the sufficiency of the 1996 development regulations; however, the challenge to
19 the sufficiency of development regulations to implement the open space corridors only
20 arose upon the adoption of the open space corridor identification. There was a legislative
21 action which could be appealed at that time – it was the adoption of the open space
22 corridors – so RCW 36.70A.290(2) applies from that action.
23
24

25 The County did not complete and adopt its identification and mapping of open space
26 corridors until 2003. Petitioners argue that the Board’s 2002 order denying reconsideration
27 effectively tolled the statute of limitations while the County was getting into compliance with
28 respect to its open space corridors. Petitioners’ Brief on Non-Belfair Issues. This is not
29 accurate. The Board held that the time for bringing a challenge to the development
30 regulations to implement the open space corridors would be when the open space corridor
31 provisions were adopted. *Dawes, et al., v. Mason County*, WWGMHB Case No. 96-2-0023c
32

1 (Order Denying Motion for Reconsideration, August 30, 2002). The open space corridor
2 identification in the plan was completed and adopted by the County and then found
3 compliant by the Board in 2003. *Dawes, et al., v. Mason County*, WWGMHB Case No.
4 96-2-0023, (Compliance Order, November 12, 2003). However, Petitioners did not bring
5 this petition until 2005.
6

7
8 In our compliance order of November 2003, this Board decided the issue of whether the
9 County had identified open space corridors “under the requirements of RCW 36.70A.160.”
10 The Board stated that “the designation of open-space corridors between Allyn and Shelton
11 comply with the GMA.” We also concluded:

12 From our review of the Petitioner’s and County’s briefs, the County’s comprehensive
13 plan and zoning ordinance, the record in this case, and the goals and requirements
14 of the GMA, we find that the County has complied with this Board’s August 19, 2002
15 Order and the goals and requirements of the GMA in regard to designating open
space corridors between Allyn and Shelton.

16 *Dawes, et al., v. Mason County*, WWGMHB Case No. 96-2-0023c, (Compliance Order,
17 November 12, 2003).

18
19 Thus any challenge to the County’s compliance with RCW 36.70A.160 was resolved in the
20 County’s favor in 2003. Petitioners cannot now re-open that issue.
21

22 To the extent that Petitioners’ claim arises under RCW 36.70A.040 (requiring the counties
23 and cities to adopt comprehensive plans and implementing development regulations by a
24 statutory deadline), Petitioners are addressing a substantive concern with the County’s
25 development regulations rather than a procedural one. The challenge here is to the
26 sufficiency of the existing development regulations to implement the identification of open
27 space corridors. That claim should have been raised when the open space corridors were
28 identified. Because a failure to act claim inherently has no constraints on the time for filing,
29 it must be based in a specific procedural requirement of the GMA. Otherwise, the time
30 limitations in RCW 36.70A.290(2) would be circumvented even though there has been a
31 legislative enactment adopted from which the time for filing a petition may be computed.
32

1 Sufficiency of development regulations to implement comprehensive plan amendments
2 should ordinarily be brought when the comprehensive plan amendments are adopted.
3

4 **Conclusion:**

5 A failure to act challenge, which is not subject to the time frames of RCW 36.70A.290(2),
6 must be based in a violation of a GMA procedural requirement, such as a failure to adopt a
7 comprehensive plan or any development regulations. Here, the County did not fail to adopt
8 its development regulations – it adopted development regulations to implement its
9 comprehensive plan in 1996. The challenges brought now (Issues 1 and 2) are to the
10 sufficiency of the development regulations enacted by the County. In the case of Harstine
11 Island, the plan policies to be implemented were in the 1996 comprehensive plan and
12 should have been challenged when the plan and development regulations were adopted in
13 1996. In the case of open space corridors, the mapping and identification of open space
14 corridors in the comprehensive plan was completed and adopted by a comprehensive plan
15 amendment in 2003. Where petitioners claim that existing development regulations are
16 insufficient to implement a comprehensive plan amendment, they must bring their petitions
17 within the statutory time-frames, pursuant RCW 36.70A.290(2) based upon the time when
18 the comprehensive plan amendments were adopted. Issues 1 and 2 were not brought
19 within the statutory timelines and are therefore not within the Board's jurisdiction.
20
21
22

23
24 C. Issues Nos. 3, 4, and 5

25 3. Whether Ordinance 128-04 fails to comply with the requirement to protect critical
26 areas pursuant to RCW 36.70A.060(2) by allowing, through amendment of
27 §17.01.110.G of the Resource Ordinance, new development in fish and wildlife
28 habitat conservation areas and their buffers associated with park or community
29 recreation development.

30 4. Whether the County failed to comply with the requirement to use best available
31 science pursuant to RCW 36.70A.172(1) by allowing approvals cited in issue 3.
32

1 5. Whether the County failed to comply with the requirement to give special
2 consideration to measures needed to preserve or enhance anadromous fisheries
3 pursuant to RCW 36.70A.172(1) by allowing approvals cited in issue 3.

4 Issues Nos. 3, 4, and 5 challenge the compliance of the amendment of Section 17.01.110 of
5 the Resource Ordinance (in Ordinance 128-04) with the Act's requirements to protect critical
6 areas, to include best available science and to give special consideration to conservation
7 measures necessary for the preservation or enhancement of anadromous fisheries,
8 pursuant to RCW 36.70A.172(1). This amendment adds an exception to the requirement for
9 a habitat management plan (HMP) for development and activities in fish and wildlife habitat
10 conservation areas or their buffers:
11

12 Park or community recreation development that is water dependent. In areas
13 maintained as existing developed use for the park or community recreation land use,
14 new development such as picnic or assembly structures is permitted and are required
15 to meet the additional review standards of the Mason County Shoreline Master
16 Program, Resource Ordinance, and other development ordinances.

17 Section 17.01.110(G)(2)(f)(2).

18 Position of Petitioners:

19 Petitioners contend that allowing new development without a habitat management plan is in
20 violation of the RCW 36.70A.060(2) mandate that each county shall adopt development
21 regulations that protect critical areas designated under RCW 36.70A.170. Petitioners
22 further argue that the County failed to consider best available science or give special
23 consideration to anadromous fisheries when amending this section of the Resource
24 Ordinance, as required by RCW 36.70A.172(1). Petitioners' Brief on Non-Belfair Issues
25 at 9, 10.
26

27 Petitioners argue that this amendment will allow new and expanded nonconforming uses.
28 They assert that because new development is allowed in park or community recreation
29 facilities within fish and wildlife conservation habitat areas (FWHCAs) and their buffers, such
30 new development must, *per se*, be a nonconforming use. Petitioners' Brief on Non-Belfair
31 Issues at 9.
32

1 Petitioners also state that the record for Ordinance 128-04 does not include any document
2 purporting to represent best available science or showing any analysis of the effects of the
3 amendment on FWHCAs or their buffers, in violation of RCW 36.70A.172(1). Petitioners'
4 Brief on Non-Belfair Issues at 10. They state that there is no indication that the County
5 gave any consideration at all to anadromous fisheries, much less special consideration, also
6 violating RCW 36.70A.172(1). Ibid. Petitioners argue that the incremental and cumulative
7 impacts of growth and of the development regulations adopted to manage that growth must
8 be considered within a framework of reason, with application of the best available science
9 and special consideration of anadromous fish, in order to ensure the protection of critical
10 areas. Petitioners' Brief on Non-Belfair Issues at 10, 11 – 12.
11
12

13 Position of County:

14 The County responds that best available science and special consideration to anadromous
15 fisheries were included during the initial adoption of the critical area resource ordinances,
16 and that best available science was utilized in adopting the challenged amendments. The
17 County states that it used the testimony and analysis of the County's own expert, Richard
18 Mraz, to assess the effects of the amendments prior to adoption of both of the Ordinances.
19 Respondent's Hearing Brief at 11. Finally, the County points out that although a Habitat
20 Management Plan is not required for water dependent uses, any development of piers, etc.,
21 still requires some kind of environmental review. Respondent's Hearing Brief at 10-11;
22 Index 1008 at 6, 25. Although a habitat management plan is only required for saltwater
23 activities, fresh water development requires other reviews. Index 1008 at 4. The County
24 notes that freshwater docks require a Mason County building permit, which gives the County
25 authority to review the project under SEPA. Index 1008 at 6; asserted at hearing
26 The County points out that SEPA review includes an environmental checklist detailing the
27 potential effects on habitat and wildlife, particularly as relating to salmon. Asserted at
28 hearing; Index 1008 at 6. That checklist is then distributed to state Department of Fish and
29
30
31
32

1 Wildlife, the Department of Ecology, the Army Corps of Engineers, and any Tribe connected
2 to the watershed. Index 1008 at 6. In the past, the County states that it has frequently
3 deferred to the recommendations of those other agencies, as those agencies have specific
4 criteria and conduct extensive, detailed review. See Index 1008 at 6. In any event, the
5 County asserts, any proposed development must still include a Mason Environmental
6 Permit (MEP). The County notes that the MEP process was also adopted using best
7 available science. Index 2003 at 3. Specifically, the MEP may be approved only if the
8 proposed activity: 1) avoids adverse impacts to the critical area, or takes affirmative and
9 appropriate measures to compensate for any potential impacts; and 2) is consistent with an
10 HMP if such a plan is required, or if the activity is approved according to a variance or
11 reasonable use exception. Index 2003 at 2. The County states that it had received no
12 scientific evidence against the proposed amendment, only the supporting evidence of
13 Mr. Mraz. See excerpted minutes of Mason County Commissioners' Proceedings of
14 December 14, 2004 (Index 2003).
15
16

17
18 **Board Analysis:**

19 Petitioners argue that Washington common law favors disincentives for continued
20 nonconforming uses. Petitioners' Brief on Non-Belfair Issues at 7. Petitioners ask the
21 Board to find the same objective in the GMA and to use that principle to interpret GMA
22 provisions. Ibid. However, that objective is not embodied in the GMA and does not have
23 the stature of a GMA goal. Also, as the County correctly stated, a single family residence in
24 an area zoned for such use is not a nonconforming use. Respondent's Hearing Brief at 10.
25 We do not, therefore, find that the County violated the GMA by possibly expanding
26 nonconforming uses.
27
28

29 However, the Ordinance does amend the County's FWHCA Resource Ordinance, which is a
30 "policy or regulation to protect the functions and values of critical areas." RCW
31 36.70A.172(1). The question before the Board is whether any such amendment to critical
32

1 areas regulations gives rise to a requirement to include best available science, and if so, to
2 what extent.

3
4 The GMA requires counties and cities to adopt development regulations that protect the
5 functions and values of critical areas. RCW 36.70A.060(2). In doing so, the counties and
6 cities “shall include the best available science” and “give special consideration to
7 conservation or protection measures necessary to preserve or enhance anadromous
8 fisheries.” RCW 36.70A.172(1). The GMA does not specify whether all amendments of
9 critical areas regulations, regardless of the extent of the amendments, must include best
10 available science and give special consideration to anadromous fisheries. This issue has
11 not previously been squarely before this Board. However, the Central Puget Sound Board
12 has addressed a similar issue. In *The Tulalip Tribes of Washington v. City of Monroe*,
13 CPSPGMHB Case No. 99-3-0013 (Final Decision and Order, January 28, 2000), at page 4,
14 the Central Board stated that “when any local government in the Central Puget Sound
15 region adopts amendments to policies and regulations that purport to protect critical areas
16 pursuant to RCW 36.70A.060(2), those enactments will be subject to meeting the BAS
17 requirements of .172.” In the case before this Board today, the Ordinance amends
18 development regulations purporting to protect critical areas, specifically FWHCAs and their
19 buffers. Following the holding of the Central Board, such an amendment is subject to the
20 best available science requirements of the GMA.
21
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24

25 However, requiring the County to go through the same degree of analysis of best available
26 science when considering an amendment to a critical areas ordinance, no matter how
27 insignificant, as is required when adopting the critical areas ordinance in the first place,
28 makes no allowance for the purpose behind RCW 36.70A.172(1). Inclusion of best
29 available science is intended to ensure that the functions and values of critical areas are
30 protected, not to impose a useless exercise on the local jurisdiction. During the hearing on
31 the merits, both the Petitioners and the County suggested that the requirement to include
32

1 best available science should be proportionate to the degree of amendment to critical areas
2 protective regulations being adopted. The Board agrees with this as a standard against
3 which the need for best available science and special consideration of anadromous fisheries
4 may be measured in this case. We find any amendment to a critical areas ordinance does
5 require inclusion of best available science because it amends “a policy or regulation to
6 protect the functions and values of critical areas” (RCW 36.70A.172(1)), but that the best
7 available science analysis, and the special consideration to anadromous fisheries, required
8 should be commensurate with the extent of the amendment to the critical areas regulation.
9

10 We review the record on this point accordingly:
11

12 The record shows that the County considered best available science upon the initial
13 adoption of the critical area resource ordinances. Index 1003 at 1, 2; Index 2003 at 3; see
14 also Excerpted Minutes of Board of Mason County Commissioners’ Proceedings of
15 November 9, 2004 at 1 in Index 1008.⁵ The record also shows that the County considered
16 the materials presented by Petitioners in the amendment process challenged here. Index
17 1003; Index 2004; Index 1008 at 4-9, 13; Index 1011 at 17; Index 2003 at 1-2. The County
18 also included new science in the form of review and analysis of the amendments by the
19 County’s expert, Richard Mraz. Excerpted Minutes of Board of Mason County
20 Commissioners’ Proceedings of November 9, 2004, at 2 – 3 in Index 1008. Mr. Mraz was
21 trained as a field biologist and holds a Bachelor’s Degree in Environmental Studies. See
22 Résumé of Richard Mraz (Appendix A of Respondent’s Hearing Brief).
23
24
25

26 Finally, the County requires that any proposed development falling within the exception for a
27 habitat management plan requirement must still meet environmental requirements on the
28 permit level. Index 2003. Under these circumstances, the actions taken by the County are
29
30
31

32 ⁵ Submitted by the County as part of its post-hearing submissions.

1 sufficient to establish inclusion of best available science proportionate to the proposed
2 amendments.

3
4 Anadromous fisheries were also considered in the initial adoption of the critical areas
5 ordinance as well as in adopting the challenged amendment. Index 1003; Index 2003 at 3.
6 We find that this was sufficient to meet the requirements for special consideration for
7 anadromous fisheries.
8

9
10 **Conclusion:**

11 In considering the effects of Ordinance 128-04, the County relied on its initial assessment of
12 best available science, the testimony and analysis of a qualified expert (the County staff
13 member who is a wildlife biologist - Mr. Richard Mraz), and the incorporation of other
14 environmental review requirements, including SEPA and MEP. The science included in the
15 record and considered by the County is sufficient to establish compliance with the best
16 available science and anadromous fisheries requirements of RCW 36.70A.172(1).
17

18
19 D. Whether the County improperly allowed the expansion of nonconforming uses –
20 Issues Nos. 6, 7, and 8

- 21
22 6. Whether Ordinance 128-04 fails to comply with the requirement to protect critical
23 areas pursuant to RCW 36.70A.060(2) by allowing substitution of nonconforming
24 uses of equal intensity within critical areas and their designated buffers through
25 amendment of §1.05.018.
26
27 7. Whether the County failed to comply with the requirement to include best available
28 science pursuant to RCW 36.70A.172(1) by allowing the action referenced in issue 6.
29
30 8. Whether the County failed to comply with the requirement to give special
31 consideration to measures needed to preserve or enhance anadromous fisheries
32 pursuant to RCW 36.70A.172(1) by allowing the action referenced in issue 6.

1 Issue No. 6 challenges Ordinance 128-04 for improperly allowing the expansion of
2 nonconforming uses. The relevant portion of the Ordinance amends Mason County
3 Development Regulations Section 1.05.018, allowing, by Special Use Permit, any
4 nonconforming use of land or a structure to be changed to a new use of equal or less
5 intensity than any prior use that occurred in a ten-year period preceding the date of
6 application, and based upon the current site conditions and compatibility with area land
7 uses. Issue 7 alleges the County failed to consider best available science in making the
8 amendment and Issue 8 alleges the County failed to give special consideration to
9 anadromous fisheries.
10

11
12 **Position of Petitioners:**

13 Petitioners assert that the effect of the Ordinance will be to encourage expanded
14 nonconforming use. They argue that this contravenes Washington common law cases
15 holding that nonconforming uses may be intensified but not expanded.⁶
16

17
18 Issues 7 and 8 challenge the compliance of Ordinance 128-04 with the best available
19 science requirement upon amendment of Development Regulation §1.05.018, allowing
20 substitution of a prior nonconforming use for a current nonconforming use. Petitioners
21 argue that since the development regulation applies generally, it potentially also applies to
22 Critical Areas, and thus the County must comply with best available science prior to
23 amending the development regulation. Petitioners' Brief on Non-Belfair Issues at 10.
24
25
26
27

28
29 ⁶ Petitioners cite a Board decision finding that a development regulation allowing any nonconforming use to
30 convert to a different nonconforming use does not comply w/the Act and substantially interferes with Goals 1,
31 2, and 12. *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c (Final Order and Decision of March 5,
32 2001) ("*Panesko*" hereafter). Petitioners' Brief on Non-Belfair Issues at 9, 10. However, Petitioners did not
allege a violation of RCW 36.70A.020 in their petition for review, so this allegation is not before the Board.
RCW 36.70A.290(1).

1 **Position of County:**

2 The County first points out that residential land use adjacent to FWHCAs is not a
3 nonconforming use; it is an allowed use. Respondent's Hearing Brief at 10. It is the
4 structures that are nonconforming. Ibid at 9. The County also notes that the nonconforming
5 use provision at issue is part of the development regulations, and completely separate from
6 the critical areas ordinances. Respondent's Hearing Brief at 8 – 9. The County points to a
7 separate nonconforming use provision included in the critical areas ordinance which does
8 not allow expansion of a nonconforming use. Ibid at 9. The nonconforming use provision
9 within the Natural Resource Ordinances is §17.01.140. It contains a number of distinctions
10 from Development Regulation §1.05.018. Respondent's Hearing Brief at 8 – 9. If the
11 County were faced with a situation in which both the zoning nonconforming use regulation
12 and the critical areas nonconforming use regulation could apply, the County asserts, the
13 most restrictive ordinance would apply. Ibid.
14
15

16
17 According to the County, the amendment to §1.05.018 is part of the zoning code, and is not
18 applicable to critical areas, nor does it modify critical areas or resource ordinances. Ibid.
19 The County argues that best available science is not required because the Ordinance
20 amends a development regulation, not a critical areas ordinance. Ibid.
21

22
23 **Board Analysis:**

24 The amendment at issue here does not open up the underlying regulation to challenge on
25 the basis that it allows substitution of one nonconforming use for another. Issue 6.
26 Substitution of one nonconforming use for another was already allowed by the regulation.
27 The amended portion only adds "or a structure" to nonconforming land uses, and allows for
28 previous uses within a 10-year period to be substituted under a special use permit. The
29 amendment does not create the allowable substitution of nonconforming uses and therefore
30 that issue cannot be raised with respect to this amendment. See *Hudson v. Clallam County*,
31 WWGMHB Case No. 96-2-0031 (Order on Motions, March 21, 1997). (Issue 6).
32

1 The best available science requirement (Issue 7) only applies to policies and regulations
2 adopted to protect critical areas:

3
4 In designating and protecting critical areas under this chapter, counties and cities
5 shall include the best available science in developing policies and development
6 regulations to protect the functions and values of critical areas. In addition, counties
7 and cities shall give special consideration to conservation or protection measures
8 necessary to preserve or enhance anadromous fisheries.

8 RCW 36.70A.172(1).

9
10 The County is correct in its argument that the requirement does not apply to the adoption of
11 zoning regulations or amendments to them. The development regulation challenged here is
12 in the nature of a zoning regulation. Therefore, the amendment to the nonconforming use
13 section of the County' zoning regulations (Section 1.05.018) does not require inclusion of
14 best available science.
15

16
17 The same principle applies with respect to special consideration to conservation and
18 protection measures necessary to preserve or enhance anadromous fisheries (Issue 8).
19 This requirement applies to "policies and development regulations to protect the functions
20 and values of critical areas." RCW 36.70A.172 It does not apply to amendments to zoning
21 regulations.
22

23
24 **Conclusion:**

25 The County's amendment of §1.05.018 did not open the pre-existing provisions regarding
26 substitution of non-conforming uses for review of the compliance of substitution of non-
27 conforming uses with the GMA because it made no change to it. Since this was the
28 challenge posed in Issue 6, it is not timely. The nonconforming use provision portion of the
29 Ordinance at issue here involves a zoning regulation rather than a development regulation
30 to protect the functions and values of critical areas. Because the development regulation
31 addressing nonconforming use is not part of the County's policies and regulations to protect
32

1 critical areas, the best available science and special consideration of anadromous fisheries
2 requirements of RCW 36.70A.172(1) do not apply.

3 4 **VI. FINDINGS OF FACT**

- 5 1. Mason County is located west of crest of the Cascade Mountains and is required to
6 plan pursuant to RCW 36.70A.040.
7
8 2. The Petitioners have participated in person or in writing in the legislative adoption
9 proceedings of Ordinance 128-04.
10 3. This case is a consolidation of two petitions for review: WWGMHB Case No. 05-2-
11 0003 filed on January 25, 2005, and WWGMHB Case No. 05-2-0009 filed on
12 February 25, 2005.
13 4. On April 27, 2005, the Board separated the issues for resolution in this case as “non-
14 Belfair UGA issues” and “Belfair UGA issues.” This final decision and order applies
15 to the “non-Belfair UGA” issues.
16 5. The “non-Belfair UGA” issues initially included challenges to Ordinance 106-04 and
17 Ordinance 128-04, as well as two failure to act challenges.
18 6. The Prehearing Order issue statement does not contain the challenges to Ordinance
19 106-04.
20 7. The June 10, 2005, Prehearing Order provided:
21 “If any party objects to any portion of this issue statement, that party must file a
22 written motion for change together with the proposed changed issue or issues in their
23 entirety no later than June 17, 2005.” This requirement was in bold and in italics.
24 8. No objections or changes to the statement of issues were filed.
25 9. The Petitioners’ brief as to the non-Belfair UGA issues was not filed in accordance
26 with the Prehearing Order issued in Case No. 05-2-0003 and, upon Petitioners’
27 motion, new dates for briefing and hearing were set.
28 10. Pursuant to the June 10, 2005, Prehearing Order, Petitioners’ Brief was due July 11,
29 2005. On July 8, Petitioners filed a request for extension of time for filing of their brief
30
31
32

1 because of a computer “crash” ten days earlier. Motion for Extension of Time. No
2 extension of time was granted. Petitioners filed their brief on July 13, 2005.

3 11. The County also filed a motion for extension of time. Motion for Extension of Time to
4 File Respondent’s Brief (July 29, 2005).

5 12. The Petitioners opposed the extension. John Diehl Letter of August 1, 2005. The
6 County’s motion for extension was not granted. The County did not file a brief prior
7 to the hearing on the merits.
8

9 13. Petitioners refused to join in the County’s motion for extension, telling the County:
10 “Because in the present case, the non-Belfair issues are not unduly complicated, I
11 am sure that you can produce a brief and appear on August 9 if you set your mind to
12 it.”

13 14. The comprehensive plan policies relevant to Harstine Island were adopted in the
14 1996 comprehensive plan.

15 15. The County’s Development Regulations were adopted June 25, 1996, to implement
16 the County’s Comprehensive Plan, also adopted in 1996.

17 16. The mapping and identification of open space corridors in the plan were adopted by
18 the County and then found compliant by the Board in 2003. *Dawes, et al., v. Mason*
19 *County*, WWGMHB Case No. 96-2-0023c, (Compliance Order, November 12, 2003).
20

21 17. Ordinance 128-04 amends the section of the Mason County Resource Ordinance
22 that lists development and activities within Fish and Wildlife Habitat Conservation
23 Areas that require a Mason Environmental Permit but do not require a habitat
24 management plan. The Ordinance also amends the section of the Mason County
25 Development Regulations governing change of use of nonconforming buildings and
26 uses.
27

28 18. Critical Area regulations are found in the Mason County Resource Ordinance, which
29 is separate from the Mason County Development Regulations.
30
31
32

- 1 19. The amendment of Section 17.01.110 of the Resource Ordinance adds an exception
2 to the requirement for a habitat management plan for development and activities in
3 fish and wildlife habitat conservation areas or their buffers:
4 20. The County considered best available science upon the initial adoption of the critical
5 area resource ordinances.
6 21. The County considered the materials presented by Petitioners in the amendment
7 process challenged here.
8 22. The County also included new science in the form of review and analysis of the effect
9 of the amendments to the County's Resource Ordinance by the County's expert,
10 Richard Mraz.
11 23. Mr. Mraz was trained as a field biologist and holds a Bachelor's Degree in
12 Environmental Studies.
13 24. The County code requires that any proposed development falling within the exception
14 for a habitat management plan requirement (Resource Ordinance 17.01.110.G.2.f)
15 must still meet environmental requirements on the permit level.
16 25. Anadromous fisheries were also considered in the initial adoption of the critical areas
17 ordinance as well as in adopting the challenged amendment. Index 1003; Index
18 2003 at 3.
19 26. The amendment to §1.05.018 is part of the County's development regulations and is
20 in the nature of an amendment to the zoning code.
21 27. The amended portion only adds "or a structure" to nonconforming land uses, and
22 allows for previous uses within a 10-year period to be substituted under a special use
23 permit. The amendment does not create the allowable substitution of nonconforming
24 uses.
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28

29 VII. CONCLUSIONS OF LAW

- 30 A. This Board has jurisdiction over the parties and subject matter of the issues related to
31 the enactment of Ordinance No. 128-04.
32

- 1 B. The Board lacks jurisdiction over the failure to act claims, Issues 1 and 2, as they are
2 untimely. RCW 36.70A.290
- 3 C. The Petitioners have standing to bring their claims Relative to Ordinance No. 128-04.
- 4 D. The claims relative to Ordinance No. 106-04 were not included in the most recent
5 Prehearing Order statement of issues, were not added within the time allotted for any
6 corrections, and therefore are not properly before the Board. RCW 36.70A.290
- 7
8 E. Ordinance No. 128-04 complies with RCW 36.70A.060(2) and 36.70A.172(1).
- 9

10 VIII. ORDER

11 The Board having found that the failure to act claims are not timely; that the issues
12 challenging Ordinance 106-04 not having been included in the final issue statement are
13 therefore not before the Board; and that Ordinance 128-04 complies with RCW
14 36.70A.060(2) and 36.70A.172(1), this case is hereby DISMISSED.

15
16

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

18 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date of
19 mailing of this Order to file a motion for reconsideration. The original and three copies
20 of a motion for reconsideration, together with any argument in support thereof, should
21 be filed with the Board by mailing, faxing or otherwise delivering the original and three
22 copies of the motion for reconsideration directly to the Board, with a copy served on all
23 other parties of record. **Filing means actual receipt of the document at the Board office.**
24 RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for
25 reconsideration is not a prerequisite for filing a petition for judicial review.

26 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
27 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
28 review may be instituted by filing a petition in superior court according to the
29 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
30 Enforcement. The petition for judicial review of this Order shall be filed with the
31 appropriate court and served on the Board, the Office of the Attorney General, and all
32 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 **actual receipt of the document at the Board office** within thirty days after

1 service of the final order. A petition for judicial review may not be served on the Board
2 by fax or by electronic mail.

3
4 Service. This Order was served on you the day it was deposited in the United States
5 mail. RCW 34.05.010(19)

6
7 Entered this 25th day of August 2005.

8
9
10
11
12 _____
Margery Hite, Board Member

13
14
15
16 _____
Holly Gadbaw, Board Member

17
18
19
20 _____
Gayle Rothrock, Board Member