

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 OVERTON ASSOCIATES, et al.,

4 Petitioners,

5 v.

CASE NO.: 05-2-0009c

6 MASON COUNTY,

7 Respondent,

8 And

**FINAL DECISION AND
ORDER ON BELFAIR
ISSUES**

9 JACK NICKLAUS, BRIAN PETERSEN, and LES
10 KRUEGER,

11 Intervenor.
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16 **I. SYNOPSIS OF DECISION**

17 In 2001, this Board approved the designation of a non-municipal urban growth area (UGA)
18 in the Belfair region of Mason County. Under the comprehensive plan policies adopted in
19 furtherance of that non-municipal UGA, a system of binding site plans for sewer extension
20 was found compliant by the Board.
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23 The petition for review in this case challenges Ordinance Number 133-04 adopting the
24 Belfair Sub-Area Plan and Zoning Code. After the Belfair UGA was designated, a
25 committee of citizens and county staff worked for a period of over two years to propose a
26 sub-area plan and draft zoning code and development regulations for the Belfair UGA.
27 Ordinance Number 133-04, Preamble. A supplemental environmental impact statement
28 was prepared for these proposed amendments to the comprehensive plan and development
29 regulations and, in December of 2004, the County adopted the Belfair Sub-Area Plan and
30 Zoning Code. Ordinance Number 133-04.
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1 In this case, Petitioners seek to revisit the Board's findings relative to the establishment of
2 the Belfair UGA in challenges to the environmental impact statement prepared for the Belfair
3 Sub-Area Plan. The Board finds that those challenges are not timely. While the update
4 requirements of RCW 36.70A.130(3) will eventually require the review of the Belfair urban
5 growth area boundaries, the County is not required to review them now. Further, the
6 County is not required to consider changing its existing comprehensive plan policies as a
7 "reasonable alternative" to the proposed Belfair Sub-Area Plan in its environmental review.
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10 Petitioners also challenge the propriety of establishing urban densities in the Belfair UGA
11 based on environmental concerns. However, the challenged ordinance sets less than urban
12 densities in environmentally sensitive areas while establishing more intense urban densities
13 in the remainder of the Belfair UGA. This complies with RCW 36.70A.110.
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16 In addition, Petitioners challenge regulations allowing expansion of non-conforming uses
17 and the failure of the County to include best available science and special consideration of
18 anadromous fisheries in the adoption of the Belfair Sub-Area Plan and Zoning Code. We
19 find that Petitioners have not met their burden of proof as to the challenges to the non-
20 conforming use changes in Ordinance 133-04. We also find that RCW 36.70A.172 does not
21 require the inclusion of best available science and special consideration of anadromous
22 fisheries in the adoption of the Belfair Sub-Area Plan and Zoning Code since they are not
23 adoptions to designate or protect critical areas.
24

25 26 **II. PROCEDURAL HISTORY**

27 This case is a consolidation of two petitions for review. The first, *Diehl and ARD v. Mason*
28 *County*, was filed on January 25, 2005, and assigned WWGMHB Case No. 05-2-0003. A
29 prehearing order was entered in WWGMHB Case No. 05-2-0003 on March 9, 2005. The
30 second, *Overton and Associates v. Mason County*, was filed on February 25, 2005, and
31 assigned WWGMHB Case No. 05-2-0009. The cases were consolidated upon the
32

1 unopposed motion of Mason County on March 24, 2005, and are now under the single
2 WWGMHB Case No. 05-2-0009c. Order Consolidating Cases (March 24, 2005). Brian
3 Petersen, Jack Nicklaus, and Les Krueger were granted leave to intervene, and their
4 motions were consolidated into WWGMHB Case No. 05-2-0009c on April 13, 2005. Order
5 Granting Intervention.
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8 Prior to consolidation of the Petitioners' petition for review with the Overton Associates'
9 petition for review, the Board entered a prehearing order setting a briefing and hearing
10 schedule in WWGMHB Case No. 05-2-0003. Prehearing Order (March 9, 2005). Overton
11 Associates and the County requested an extension of the decision deadline in order to
12 engage in settlement discussions on the issues related to Ordinance 133-04, the Belfair
13 UGA. On April 27, 2005, the Board separated the issues for resolution in the case as "non-
14 Belfair UGA issues" and "Belfair UGA issues" and extended the deadline for decision as to
15 the Belfair UGA issues. Order Extending Final Decision and Order Deadline and
16 Segmenting the Adjudication. In that order, the Board confirmed the hearing date already
17 set as to the non-Belfair UGA issues (July 7, 2005), and the deadline for final decision and
18 order of August 25, 2005. The Board also established a new hearing date of October 11,
19 2005, and a new deadline for final decision and order on the Belfair UGA issues of
20 November 22, 2005. However, no scheduling order was issued subsequent to the
21 consolidation of these cases and the prehearing order in WWGMHB Case No. 05-2-0003
22 remained the only order in effect for scheduling purposes. Under this order, Petitioners'
23 brief for the July 7th hearing on the merits was due May 24, 2005. On May 31, 2004,
24 Petitioners Diehl and ARD filed a motion for clarification of the briefing schedule and
25 requested a new briefing schedule. The Petitioners' brief as to the non-Belfair UGA issues
26 was not filed in accordance with the prehearing order issued in Case No. 05-2-0003 and a
27 second prehearing conference was held to address the problem. On June 10, 2005, new
28 dates for briefing and hearing were set. Petitioners Diehl and ARD withdrew their objection
29 to the extension of decision deadline as to the Belfair UGA issues and a new briefing
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1 schedule for the non-Belfair issues was established. The new schedule for this case, on
2 two tracks, was established in the prehearing order issued in WWGMHB Case No. 05-2-
3 0009c on June 10, 2005. Prehearing Order and Order Extending Deadline for Final
4 Decision and Order.
5

6
7 Petitioners Diehl and ARD filed a dispositive motion on April 21, 2005. The Board declined
8 to decide the issues on motions and held them over to a full hearing on the merits. Order
9 Denying Dispositive Motion (May 11, 2005).

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11 The non-Belfair UGA issues were decided in the Final Decision and Order on those issues
12 on August 25, 2005. Final Decision and Order on Non-Belfair Issues.
13

14
15 On September 27, 2005, Petitioner Overton Associates moved to dismiss its petition for
16 review on the grounds that it preferred to engage in discussions with the County rather than
17 pursue litigation. Motion of Overton for Dismissal (September 27, 2005). This motion was
18 unopposed and granted on October 4, 2005. Order Dismissing Overton Petition.
19

20
21 The Hearing on the Merits was held in Shelton, Washington, on October 11, 2005. John
22 Diehl appeared for the Petitioners. Deputy Prosecutor T.J. Martin, and Robert Fink,
23 Planning Manager for Mason County's Department of Community Development, appeared
24 for Mason County. All three board members were present. As a result of the dismissal of
25 the Overton Associates' petition, issues 2-6 of the issue statement in the Prehearing Order
26 concerning challenges to Ordinance 133-04 were dismissed without objection. The Board
27 asked the County to submit four exhibits post-hearing: the development regulations
28 effective prior to the adoption of Ordinance 133-04 on urban uses and intensities allowed in
29 the Belfair UGA; regulations imposing a requirement to hook up to public sewer upon its
30 availability as part of binding site plan approvals; the state legislative grant of funding for
31 sewer construction in the Belfair UGA; and the Mason County/Hood Canal Water
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1 Reclamation Facilities Plan (2001) (Index No. 4017). These exhibits were due on or before
2 October 18, 2005. The parties were granted until October 28, 2005, to submit responses,
3 limited to the significance of the new exhibits. The Petitioners filed their response on
4 October 25, 2005. Petitioners' Response to Supplemental Evidence.
5

6 7 **III. ISSUES PRESENTED**

8 Upon the dismissal of the petition for review by Overton Associates, issues 2-6 concerning
9 Ordinance 133-04 were not briefed. At the hearing on the merits, those issues were
10 dismissed and the following issues set out in the Prehearing Order challenging the adoption
11 of Ordinance 133-04 remain for resolution:
12

13
14 **1. Has the County failed to provide environmental disclosures required by the State**
15 **Environmental Policy Act (SEPA), RCW 43.21C, and WAC 197-11, in adopting as**
16 **Ordinance 133-04 amendments to the Mason County Comprehensive Plan**
17 **regarding the Belfair Urban Growth Area and to the related zoning map and**
18 **development regulations, particularly:**

19 **a. Has the County failed to comply with RCW 43.21C.020(2) and .030(2)(e)**
20 **and WAC 197-11-400(5), by failing in its environmental disclosures to examine in**
21 **reasonable detail a reasonable range of alternatives that could feasibly attain or**
22 **approximate the proposal's objectives, but at a lower environmental cost or**
23 **decreased level of environmental degradation?**
24

25 **b. Has the County failed to comply with WAC 197-11-400(5)(c)(v), by not**
26 **devoting sufficiently detailed analysis to each reasonable alternative to permit a**
27 **comparative evaluation of the alternatives including the proposed action?**
28

29 **c. Has the County failed to adequately examine impacts on native plants**
30 **and animals of the various alternatives considered in its environmental**
31 **disclosures, including the requirement of RCW 43.21C.030(2)(c)(iv) to provide a**
32 **detailed statement on the relationship between local short-term uses of man's**

1 *environment and the maintenance and enhancement of long-term productivity?*

2 *d. Has the County failed to comply with RCW 43.21C.030(2)(b), specifically*
3 *neglecting to identify and develop methods and procedures, in consultation with*
4 *the department of ecology and ecological commission, which will insure that*
5 *presently unquantified environmental amenities and values will be given*
6 *appropriate consideration in decision making along with economic and technical*
7 *considerations?*

9 *e. Has the County failed to comply with WAC 197-11-400(5)(c)(vii) by failing*
10 *to provide adequate discussion of the benefits and disadvantages of reserving for*
11 *some future time the implementation of the proposal, as compared with possible*
12 *approval at this time?*

13 7. *a. Whether adoption of the Plan violates GMA density requirements*

14 *b. By allowing urban development in areas not characterized by urban*
15 *growth and at densities that may result in greater areas allocated to urban growth*
16 *than are needed to permit the urban growth projected to occur in the County for*
17 *the succeeding twenty-year period, does Ordinance 133-04 fail to comply with*
18 *RCW 36.70A.110?*

19 8. *By approving expansion of nonconforming uses and structures through δ*
20 *17.23.270, 17.24.16, and 17.24.260, does Ordinance 133-04 fail to comply with GMA*
21 *goals and requirements, including RCW 36.70A.040, .060, and .110?*
22

23 9. *Has the County failed, in adopting Ordinance 133-04 without attention to the*
24 *special needs of sensitive wildlife species such as the pileated woodpecker, to*
25 *substantially include best available science pursuant to RCW 36.70A.172(1)?*
26

27 10. *Has the County failed, in adopting Ordinance 133-04, to give special*
28 *consideration to conservation or protection measures necessary to preserve or*
29 *enhance anadromous fisheries, contrary to RCW 36.70A.172(1)?*
30

31 11. *By allowing high-density residential development in a critical aquifer recharge*
32 *area and an area not required to have a storm water management plan for*

1 **development of a parcel that does not result in more than 5,000 square feet of**
2 **impervious area, did the County's planning for areas in Belfair near the Union**
3 **River and Hood Canal fail to include best available science pursuant to RCW**
4 **36.70A.172(1)?**
5

6 7 IV. BURDEN OF PROOF

8 For purposes of board review of the comprehensive plans and development regulations
9 adopted by local government, the GMA establishes three major precepts: a presumption of
10 validity; a "clearly erroneous" standard of review; and a requirement of deference to the
11 decisions of local government.
12

13 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
14 amendments to them are presumed valid upon adoption:
15

16 Except as provided in subsection (5) of this section, comprehensive plans and
17 development regulations, and amendments thereto, adopted under this chapter are
18 presumed valid upon adoption.

19 RCW 36.70A.320(1).

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

22 The board shall find compliance unless it determines that the action by the state
23 agency, county, or city is clearly erroneous in view of the entire record before the
24 board and in light of the goals and requirements of this chapter.

25 RCW 36.70A.320(3).

26 In order to find the County's action clearly erroneous, the Board must be "left with the firm
27 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
28 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
29

30 Within the framework of state goals and requirements, the boards must grant deference to
31 local government in how they plan for growth:
32

1 In recognition of the broad range of discretion that may be exercised by counties and
2 cities in how they plan for growth, consistent with the requirements and goals of this
3 chapter, the legislature intends for the boards to grant deference to the counties and
4 cities in how they plan for growth, consistent with the requirements and goals of this
5 chapter. Local comprehensive plans and development regulations require counties
6 and cities to balance priorities and options for action in full consideration of local
7 circumstances. The legislature finds that while this chapter requires local planning to
8 take place within a framework of state goals and requirements, the ultimate burden
9 and responsibility for planning, harmonizing the planning goals of this chapter, and
10 implementing a county's or city's future rests with that community.
11 RCW 36.70A.3201 (in part).

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

17 The burden of proof in a challenge under the State Environmental Policy Act (SEPA) (Ch.
18 43.21C RCW) is also borne by the Petitioners. Petitioners have the burden of showing a
19 lack of SEPA compliance for GMA purposes on the clearly erroneous standard. *Durland v.*
20 *San Juan County*, WWGMHB Case No. 00-2-0062c (Final Decision and Order, May 7,
21 2001). Whether an environmental impact statement is adequate is a question of law.
22 *Citizens v. Klickitat County*, 122 Wn.2d 619, 626, 866 P.2d 1256 (1993). The adequacy of
23 an EIS is tested under the "rule of reason," which requires a "reasonably thorough
24 discussion of the significant aspects of the probable environmental consequences" of the
25 agency's decision. *Ibid.* The decision of the governmental agency must be accorded
26 substantial weight. RCW 43.21C.090.

30 V. DISCUSSION

31 A. SEPA Challenges

32 ***Issue No. 1: Has the County failed to provide environmental disclosures required by***

1 *the State Environmental Policy Act (SEPA), RCW 43.21C, and WAC 197-11, in*
2 *adopting as Ordinance 133-04 amendments to the Mason County Comprehensive*
3 *Plan regarding the Belfair Urban Growth Area and to the related zoning map and*
4 *development regulations, particularly:*

5 a. *Has the County failed to comply with RCW 43.21C.020(2) and .030(2)(e)*
6 *and WAC 197-11-400(5), by failing in its environmental disclosures to examine in*
7 *reasonable detail a reasonable range of alternatives that could feasibly attain or*
8 *approximate the proposal's objectives, but at a lower environmental cost or*
9 *decreased level of environmental degradation?*

10 b. *Has the County failed to comply with WAC 197-11-400(5)(c)(v), by not*
11 *devoting sufficiently detailed analysis to each reasonable alternative to permit a*
12 *comparative evaluation of the alternatives including the proposed action?*

13 c. *Has the County failed to adequately examine impacts on native plants*
14 *and animals of the various alternatives considered in its environmental*
15 *disclosures, including the requirement of RCW 43.21C.030(2)(c)(iv) to provide a*
16 *detailed statement on the relationship between local short-term uses of man's*
17 *environment and the maintenance and enhancement of long-term productivity?*

18 d. *Has the County failed to comply with RCW 43.21C.030(2)(b), specifically*
19 *neglecting to identify and develop methods and procedures, in consultation with*
20 *the department of ecology and ecological commission, which will insure that*
21 *presently unquantified environmental amenities and values will be given*
22 *appropriate consideration in decision making along with economic and technical*
23 *considerations?*

24 e. *Has the County failed to comply with WAC 197-11-400(5)(c)(vii) by failing*
25 *to provide adequate discussion of the benefits and disadvantages of reserving for*
26 *some future time the implementation of the proposal, as compared with possible*
27 *approval at this time?*

1 **Positions of the Parties:**

2 Petitioners argue that the Final Supplemental Environmental Impact Statement issued on
3 this action failed to examine reasonable alternatives to the proposal: “at least examine the
4 possibility of a temporary moratorium on certain kinds of land development until the problem
5 of bringing sewer and storm water treatment to the UGA are resolved.” Petitioners’ Brief on
6 Belfair Issues at 4. Petitioners also allege that the analysis of alternatives was superficial
7 (*Ibid* at 5); failed to provide a detailed statement of the relationship between local short-term
8 issues and long-term productivity (*Ibid* at 6); failed to appropriately consider unquantifiable
9 environmental amenities and values (*Ibid*); and failed to discuss reserving implementation of
10 the proposal to some future time (*Ibid* at 6-7).
11

12
13 The County responds that the County must consider only reasonable alternatives “feasible
14 to meet the proposal’s objective and this was done here.” Respondent’s Prehearing Brief
15 on Belfair Issues at 4. The County asserts that the Petitioners have shown that neither the
16 discussion of reasonable alternatives in the FSEIS was inadequate nor that sufficient
17 consideration was not given to “non-monetary amenities.” *Ibid* at 5-6. The County reminds
18 the Board that the burden is on the Petitioners to provide clear and convincing reasons why
19 the FSEIS does not meet the statutory requirements and argues that the Petitioners have
20 failed in their burden of proof. *Ibid*.
21
22

23
24 The Intervenor also point out that the range of alternatives required for an EIS only
25 includes actions that could feasibly attain or approximate a proposal’s objectives.
26 Intervenor Brian Petersen, Jack Nicklaus, and Les Krueger’s Response Brief on Belfair
27 Issues at 8. The three alternatives considered in the FSEIS, Intervenor argue, are possible
28 actions to achieve the objective of a Belfair Plan and zoning code controlling future
29 development in the Belfair UGA – the alternative the Petitioners claim should have been
30 included would have been to prohibit, rather than to control, future development. *Ibid* at 9-
31 10. Since adoption of the Belfair Plan and regulations is a non-project action, Intervenor
32

1 argue that the discussion of the alternatives did not require the detail appropriate and was
2 reasonable. *Ibid* at 10-11.

3
4 Both the Respondent and the Intervenors view the challenge in Issue 1(c) as an untimely
5 and collateral attack on the County's critical areas ordinance. Intervenors Brian Petersen,
6 Jack Nicklaus, and Les Krueger's Response Brief on Belfair Issues at 11; Respondent's
7 Prehearing Brief on Belfair Issues at 5-6.
8

9
10 **Board Discussion:**

11 As a fundamental proposition, it is important to bear in mind that the challenged FSEIS
12 pertains to the proposed action of adopting a subarea plan for the Belfair UGA, rather than
13 being a general environmental review of the establishment of the Belfair UGA. The
14 environmental review of the establishment of the Belfair UGA occurred at the time of the
15 adoption of that UGA and this Board's decision finding compliance on the challenges to the
16 Belfair UGA was entered in 2001. *Dawes, et al., v. Mason County, WWGMHB Case No.*
17 *96-2-0023c (Compliance Order Re: Previous Findings of Noncompliance, March 1, 2001).*
18

19
20 In this case, the proposed action was adoption of a plan amendment for the Belfair Urban
21 Growth Area together with the adoption of new zoning codes and development design
22 guidelines for that area. Fact Sheet, Final Supplemental Environmental Impact Statement
23 for the Proposed Belfair Urban Growth Area Plan and Development Regulations,
24 November 23, 2004 (Index 4241). The County Commissioners' findings state that the
25 ordinance will "create revise [sic] the Belfair sub-area plan and development regulations,
26 including zoning districts and development standards which will be applicable only within the
27 boundary of the Belfair Urban Growth Area." Findings of Fact 1, Board of County
28 Commissioners, December 28, 2004, Ordinance 133-04 (Index 4275).
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1 Ordinance 133-04 did not change the comprehensive plan provisions establishing the
2 Belfair UGA, including the Urban Growth Boundary Policies (p. III-2.2) and the phasing of
3 growth policies addressed to urban services in plan policies BUGA 5-9. Mason County
4 Comprehensive Plan – April, 1996 (Revised May 2000; August 2003), Attachment A to
5 Ordinance 133-04 (Index 4241). There are changes to the comprehensive plan in
6 Ordinance 133-04: prior residential, commercial, industrial, and open space and recreation
7 policies for the Belfair UGA are deleted (*Ibid* at page III-2.6-2.8) and those are replaced by
8 the Belfair Urban Growth Area Plan. Appendix A to Attachment A to Ordinance 133-04.
9

10
11 However, the Belfair Urban Growth Area Plan does not alter the comprehensive plan
12 policies with respect to delineation of boundaries of the Belfair UGA or the provision of
13 urban services within the UGA. In the context of the challenges to the FSEIS here, this is
14 important because Petitioners are essentially seeking to challenge the failure of the FSEIS
15 to consider changes to those underlying comprehensive plan policies that have been found
16 compliant. However, there is nothing in SEPA requiring a jurisdiction to consider changing
17 its policies when it adopts provisions to implement those same policies.
18
19

20 The FSEIS considers four alternatives: the recommended alternative developed by the
21 Belfair Sub-Area Planning Committee after considering a number of variations; the no-action
22 alternative; the PAC/reduced density alternative; and the remove agricultural land
23 alternative. FSEIS pp. 4-6 (Index 4241). The regulations provide that an EIS shall describe
24 and present alternative courses of action:
25
26

27 Alternatives including the proposed action.

- 28 (a) This section of the EIS describes and presents the proposal (or preferred
29 alternative, if one or more exists) and alternative courses of action.
30 (b) Reasonable alternatives shall include actions that could feasibly attain or
31 approximate a proposal's objectives, but at a lower environmental cost or
32 decreased level of environmental degradation.

(i) The word "reasonable" is intended to limit the number and range of

- 1 alternatives, as well as the amount of detailed analysis for each
- 2 alternative.
- 3 (ii) The “no-action” alternative shall be evaluated and compared to other
- 4 alternatives.
- 5 (iii) Reasonable alternatives may be those over which an agency with
- 6 jurisdiction has authority to control impacts either directly, or indirectly
- 7 through requirement of mitigation measures.

8 WAC 197-11-440(5).

9 The standard for reviewing the adequacy of an EIS is the “rule of reason.” *Citizens v.*
10 *Klickitat County*, 122 Wn.2d 619, 866 P.2d 1256 (1993). The statement must present a
11 reasonably thorough discussion of the significant aspects of the probable environmental
12 consequences of the agency’s decision. *Weyerhauser v. Pierce County*, 124 Wn.2d 26,
13 (1994). Petitioners base their attack on the FSEIS on the absence of a consideration of a
14 moratorium on certain kinds of land development (Petitioners’ Brief on Belfair Issues at 4)
15 and the failure to discuss reserving implementation of development within the Belfair UGA.
16 *Ibid* at 6-7. A moratorium on development would not attain the objectives of the proposal
17 because it would not implement the existing plan policies on the Belfair UGA. While the
18 County might have elected to revisit those plan policies, there is nothing in SEPA requiring
19 them to do so. Under these circumstances, the alternatives considered in the FSEIS are
20 reasonable.
21

22
23
24 Petitioners’ challenges to the adequacy of the FSEIS focus on environmental harm that may
25 come to the area in general and Hood Canal in particular as a result of urban development
26 within the Belfair UGA. Petitioners’ Reply Brief on Belfair Issues at 2. Petitioners note that
27 the proposal requires no construction of municipal sewer, leading to exacerbated nitrogen
28 loads on Hood Canal. *Ibid* at 3. However, the decision to allow urban growth in Belfair was
29 made and found compliant years ago when the boundaries of the Belfair UGA were found
30 compliant. See *Dawes, et al., v. Mason County*, WWGMHB Case No. 96-2-0023c
31 (Compliance Order Re: Previous Findings of Noncompliance, March 1, 2001). Moreover,
32

1 the policies with respect to urban services including phasing of sewer have not been
2 changed and are not a required subject for environmental review in the adoption of a sub-
3 area plan which does not change them. Thus, while Petitioners may have thoughtful
4 arguments concerning the environmental impacts of growth within the Belfair UGA, those
5 arguments are not properly challenged to the adequacy of this FSEIS.
6

7
8 **Conclusion:** The FSEIS for Ordinance 133-04 contains a reasonably thorough discussion
9 of a reasonable range of alternatives to the proposal and is adequate under SEPA, Ch.
10 43.21C RCW.

11
12 **B. GMA Challenges**

13 *Issue 7.*

- 14 *a. Whether adoption of the Plan violates GMA density requirements*
15
16 *b. By allowing urban development in areas not characterized by urban*
17 *growth and at densities that may result in greater areas allocated to*
18 *urban growth than are needed to permit the urban growth projected to*
19 *occur in the County for the succeeding twenty-year period, does*
20 *Ordinance 133-04 fail to comply with RCW 36.70A.110?*
21

22
23 **Positions of the Parties:**

24 Petitioners argue that Ordinance 133-04 violates the GMA density requirements because
25 the present average density within the Belfair UGA is one person per 2.67 acres.

26 Petitioners' Brief on Belfair Issues at 7. Petitioners also argue that the failure to provide for
27 staging growth or limiting urban growth to those parts of the UGA where urban services can
28 be available at the time of occupancy fails to comply with RCW 36.70A.110. *Ibid.*
29

30
31 Mason County responds that the County has made every attempt to locate growth in the
32 UGA and provides a variety of densities to encourage growth within the urban growth

1 boundaries. Respondent's Prehearing Brief on Belfair Issues at 7. The Intervenors point
2 out that the Belfair UGA was designated and urban densities of 4 dwelling units per acre
3 were allowed in the Belfair UGA prior to the adoption of Ordinance 133-04. Intervenors
4 Brian Petersen, Jack Nicklaus and Les Krueger's Response Brief on Belfair Issues at 14.
5

6 **Board Discussion**

7
8 The issue of appropriate urban densities in the Belfair UGA is before the Board to the extent
9 that Ordinance 133-04 modified the existing densities. However, Petitioners' challenge
10 appears to be directed to the designation of the entire UGA in the first place. As we have
11 said above, this challenge is not timely since the Belfair UGA boundaries were found
12 compliant in 2001. Further, Petitioners challenge the urban densities based upon the
13 population now living in the Belfair UGA. The residential densities of 4 dwelling units per
14 acre allowed in the Belfair UGA were found compliant by this Board in 2001 and residential
15 densities of 4 dwelling units per acre are considered urban densities. See *Bremerton v.*
16 *Kitsap County*, CPSGMHB Case No. 95-3-0039c (Final Decision and Order, October 6,
17 1995); *Berschauer v. Tumwater*, WWGMHB Case No. 94-2-0002 (Final Decision and Order,
18 July 27, 1994); and *Klein v. San Juan County*, WWGMHB Case No. 02-2-0008 (Final
19 Decision and Order, October 15, 2002).
20
21

22
23 The change in urban residential densities allowed pursuant to the Belfair Urban Growth
24 Area Plan does not reduce the allowable urban densities except in environmentally sensitive
25 areas where densities of 3 dwelling units per acre (R-3) are allowed. MCC 17.22.110.
26 Otherwise, the allowable urban residential densities are 5 per acre (R-5) (MCC 17.22.200)
27 and 10 per acre (MCC 17.22.300) (R-10). Petitioner does not challenge the R-3 zone and
28 offers no evidence to suggest that the County has not properly adjusted residential densities
29 to allow for steep slopes and critical areas. Since the increase in allowable urban densities
30 to 5 dwelling units per acre and 10 dwelling units per acre encourages urban densities
31 within the established UGA, they are appropriate for the Belfair UGA.
32

1 Petitioners' challenge to the failure to stage growth commensurate with urban services is not
2 timely. The decision to designate the Belfair UGA boundaries and to allow the County's
3 system of binding site plans is embodied in comprehensive plan policies that were adopted
4 years ago and found compliant in 2001. See policies BUGA 5-9 of the Mason County
5 Comprehensive Plan.
6

7
8 **Conclusion:** The urban densities allowed in the Belfair Urban Growth Area Plan are
9 compliant with RCW 36.70A.110. The challenge to the failure to phase growth according to
10 the availability of urban services is not timely.
11

12 ***Issue 8. By approving expansion of nonconforming uses and structures***
13 ***through § 17.23.270, 17.24.165, and 17.24.260, does Ordinance 133-04 fail to***
14 ***comply with GMA goals and requirements, including RCW 36.70A.040, .060,***
15 ***and .110?***
16

17
18 **Positions of the Parties:**

19 Petitioners argue that provisions that allow expansion of nonconforming uses encourage
20 their continued use. Petitioners' Brief on Belfair Issues at 7-8. Petitioners further argue that
21 although the increases in size allowed may be individually insignificant, their cumulative
22 impact is potentially significant. *Ibid* at 8.
23

24
25 The County responds that it is unclear on what basis Petitioners claim that the challenged
26 provisions on nonconforming uses fail to comply with GMA goals. The County urges the
27 Board to adopt the same ruling with respect to nonconforming uses in the Belfair UGA as it
28 held in its decision on the challenges to the non-Belfair UGA issues in this case.
29

30 Respondent's Prehearing Brief on Belfair Issues at 7.
31
32

1 Intervenors also respond that the Petitioners fail to explain how the nonconforming use
2 regulations in any way interfere with GMA goals and requirements. Intervenors Brian
3 Petersen, Jack Nicklaus and Les Krueger's Response Brief on Belfair Issues at 15.
4

5 **Board Discussion:**
6

7 The Board agrees with the County and Intervenors that the Petitioners have failed to
8 provide evidence of how the challenged nonconforming use regulations - MCC 17.23.270,
9 17.24.165, and 17.24.200 - fail to comply with RCW 36.70A.040, 36.70A.060, and
10 36.70A.110. Petitioners further fail to explain how these new Mason County Code sections
11 fail to comply with these statutory provisions. The burden is on Petitioners to present clear
12 and convincing evidence of the noncompliance of these challenged enactments; general
13 argument about the necessity for eliminating nonconforming uses is not sufficient.
14

15
16 **Conclusion:**

17 Petitioners have failed to carry their burden of demonstrating that MCC 17.23.270,
18 17.24.165, and 17.24.200 are clearly erroneous and fail to comply with RCW 36.70A.040,
19 36.70A.060, and 36.70A.110.
20

21
22 ***Issue 9. Has the County failed, in adopting Ordinance 133-04 without attention***
23 ***to the special needs of sensitive wildlife species such as the pileated***
24 ***woodpecker, to substantially include best available science pursuant to RCW***
25 ***36.70A.172(1)?***
26

27
28 ***Issue 10. Has the County failed, in adopting Ordinance 133-04, to give special***
29 ***consideration to conservation or protection measures necessary to preserve or***
30 ***enhance anadromous fisheries, contrary to RCW 36.70A.172(1)?***
31

32 ***Issue 11. By allowing high-density residential development in a critical aquifer***

1 **recharge area and an area not required to have a storm water management**
2 **plan for development of a parcel that does not result in more than 5,000 square**
3 **feet of impervious area, did the County's planning for areas in Belfair near the**
4 **Union River and Hood Canal fail to include best available science pursuant to**
5 **RCW 36.70A.172(1)?**
6

7
8 **Positions of the Parties:**

9 Petitioners argue that the County failed to include best available science (BAS) in the
10 development regulations adopted for the Belfair UGA. Petitioners' Brief on Belfair Issues at
11 9. Petitioners claim that the County has not included best available science substantively
12 and is simply "hoping for the best." *Ibid*. Petitioners also claim that the County has not
13 given special consideration to conservation or protection measures necessary to preserve
14 or enhance anadromous fisheries. *Ibid* at 10.
15

16
17 The County responds that RCW 36.70A.172, the requirements to include best available
18 science and give special consideration to anadromous fisheries, does not apply to the
19 zoning and design regulations adopted in Ordinance 133-04: "Mason County, in passing
20 Ordinance 133-04, adopted the Belfair Sub-Area Plan and Zoning Code, not amended [sic]
21 Mason County's Critical Areas Ordinance." Respondent's Prehearing Brief on Belfair Issues
22 at 8. The Intervenors make the same point. Intervenors Brian Petersen, Jack Nicklaus and
23 Les Krueger's Response Brief on Belfair Issues at 16.
24

25
26 **Board Discussion:**

27 Issues 9-11 allege that Ordinance 133-04 fails to comply with RCW 36.70A.172:
28

29
30 **Critical areas – Designation and protection – Best available science to be used.**
31 (1) In designating and protecting critical areas under this chapter, counties and cities
32 shall include the best available science in developing policies and development
 regulations to protect the functions and values of critical areas. In addition, counties

1 and cities shall give special consideration to conservation or protection measures
2 necessary to preserve or enhance anadromous fisheries.
3 RCW 36.70A.172(1).

4 While the County and Intervenors point out that Ordinance 133-04 did not amend the
5 County's critical areas ordinance, Petitioners allege that RCW 36.70A.172 must apply not
6 just to the critical areas ordinance but to all development regulations that impact critical
7 areas. Petitioners' Reply Brief on Belfair Issues at 6. "The fundamental problem with
8 saying that the requirements of RCW 36.70A.172 apply only to the former [development
9 regulations specifically designed to protect critical areas] is that it creates the potential for
10 virtual nullification of the latter." *Ibid.*

11
12
13 Petitioners' argument that RCW 36.70A.172 must apply to all development regulations that
14 may impact critical areas since other regulations could nullify the protections of the critical
15 areas ordinance has no foundation in the GMA. First and foremost, the Board cannot
16 impose a requirement that the GMA does not create. On its face, RCW 36.70A.172 only
17 applies to the designation and protection of critical areas. "In designating and protecting
18 critical areas under this chapter..." Therefore, inclusion of best available science and
19 special consideration of anadromous fisheries is only required in the adoption of critical
20 areas designations and protections. While a best available science analysis of the impact of
21 zoning regulations on critical areas might be useful, the GMA does not require it.
22
23

24
25 In addition, Petitioners' argument does not logically follow from the injury Petitioners seek to
26 avoid. If newly adopted regulations impact the effectiveness of the critical areas
27 regulations, then the challenge to those new regulations would be that they violate the
28 requirement to protect critical areas. However, this does not mean that they violate the
29 requirement to include best available science in those protections. A challenge to
30 development regulations that change the protectiveness of critical areas regulations would
31
32

1 rest on RCW 36.70A.060 rather than on the failure to include best available science
2 pursuant to RCW 36.70A.172.
3

4 **Conclusion:** The County did not fail to comply with RCW 36.70A.172 when it adopted
5 Ordinance 133-04.
6

7
8 **FINDINGS OF FACT**

- 9 1. Mason County is located west of the crest of the Cascade Mountains and is required
10 to plan pursuant to RCW 36.70A.040.
11 2. The Petitioners have participated in person or in writing in the legislative adoption
12 proceedings of Ordinance 133-04.
13 3. This case is a consolidation of two petitions for review: WWGMHB Case No. 05-2-
14 0003 filed on January 25, 2005, and WWGMHB Case No. 05-2-0009 filed on
15 February 25, 2005.
16 4. On April 27, 2005, the Board separated the issues for resolution in this case as “non-
17 Belfair UGA issues” and “Belfair UGA issues.” This final decision and order applies
18 to the “Belfair UGA” issues.
19 5. The challenged Final Supplemental Environmental Impact Statement (FSEIS)
20 pertains to the proposed action of adopting a subarea plan for the Belfair UGA.
21 6. The environmental review of the establishment of the Belfair UGA occurred at the
22 time of the adoption of that UGA and this Board’s decision finding compliance on the
23 challenges to the Belfair UGA was entered in 2001.
24 7. Ordinance 133-04 did not change the comprehensive plan provisions establishing the
25 Belfair UGA, including the Urban Growth Boundary Policies (p. III-2.2) and the
26 phasing of growth policies addressed to urban services in plan policies BUGA 5-9.
27 8. The FSEIS considers four alternatives: the recommended alternative developed by
28 the Belfair Sub-Area Planning Committee after considering a number of variations;
29 the no-action alternative; the PAC/reduced density alternative; and the remove
30
31
32

1 agricultural land alternative.

- 2 9. The policies with respect to urban services including phasing of sewer have not been
3 changed and are not a required subject for environmental review in the adoption of a
4 sub-area plan which does not change them.
- 5 10. The change in urban residential densities allowed pursuant to the Belfair Urban
6 Growth Area Plan does not reduce the allowable urban densities except in
7 environmentally sensitive areas where densities of 3 dwelling units per acre (R-3) are
8 allowed. MCC 17.22.110.
- 9 11. Outside of the R-3 zone, the allowable urban residential densities are 5 per acre (R-
10 5) (MCC 17.22.200) and 10 per acre (MCC 17.22.300) (R-10).
- 11 12. The decision to designate the Belfair UGA boundaries and to allow the County's
12 system of binding site plans is embodied in comprehensive plan policies that were
13 adopted years ago and found compliant in 2001.
- 14 13. Petitioners have failed to provide evidence of how the challenged nonconforming use
15 regulations - MCC 17.23.270, 17.24.165, and 17.24.200 - fail to comply with RCW
16 36.70A.040, 36.70A.060, and 36.70A.110.
- 17 14. Ordinance 133-04 did not amend the County's critical areas ordinance.
- 18
19
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21

22 VI. CONCLUSIONS OF LAW

- 23 A. This Board has jurisdiction over the parties and subject matter of the issues related to
24 the enactment of Ordinance No. 133-04.
- 25 B. The Petitioners have standing to bring their claims relative to Ordinance No. 133-04.
- 26 C. Ordinance No. 133-04 complies with RCW 36.70A.110 and Ch. 43.21C RCW.
- 27 D. RCW 36.70A.172 does not apply to Ordinance No. 133-04.
- 28
29

30 VII. ORDER

31 The Board having found that Ordinance 133-04 complies with RCW 36.70A.060(2) and
32 36.70A.172(1), this case is hereby DISMISSED.

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

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

11 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
12 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
13 judicial review may be instituted by filing a petition in superior court according to the
14 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
15 Enforcement. The petition for judicial review of this Order shall be filed with the
16 appropriate court and served on the Board, the Office of the Attorney General, and all
17 parties within thirty days after service of the final order, as provided in RCW
18 34.05.542. Service on the Board may be accomplished in person or by mail, but
19 service on the Board means **actual receipt of the document at the Board office** within
20 thirty days after service of the final order. A petition for judicial review may not be
21 served on the Board by fax or by electronic mail.

22 **Service.** This Order was served on you the day it was deposited in the United States
23 mail. RCW 34.05.010(19).

24 Entered this 14th day of November 2005.

25 _____
26 Margery Hite, Board Member

27 _____
28 Holly Gadbow, Board Member

29 _____
30 Gayle Rothrock, Board Member