BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

ADVOCATES FOR RESPONSIBLE DEVELOPMENT and JOHN E. DIEHL, Petitioners, v. MASON COUNTY, Respondent.	CASE NO. 06-2-0005 **COMPLIANCE ORDER ON PLAN AND DEVELOPMENT REGULATIONS – SEWER IN BELFAIR UGA**

I. SYNOPSIS

THIS Matter came before the Board at a compliance hearing on the County's sewer plan for the Belfair urban growth area (UGA); and on the County's regulations to protect against inconsistent development until urban levels of sewer service are available in the Belfair UGA. While the Board finds that there are still points of non-compliance, we would like to emphasize the very fine work the County has been doing and the significant accomplishment its compliance efforts represent.

Mason County has made enormous progress towards achieving the goal of public sewer for the Belfair UGA. Public funding has been obtained for the first phase of the plan, which is projected to serve the "core" of the Belfair UGA within 2-3 years. The County's sewer plan also shows a sewer system sized to serve the projected build-out of the Belfair UGA over the next ten years. The development regulations require everyone, even those on existing septic systems, to connect to sewer when it comes within 500 feet of their property. The Board recognizes this difficult and responsible decision by the County Commissioners. It is a considerable achievement.

The remaining non-compliant features of the Sewer Plan and development regulations primarily center around the lack of a plan for financing sewer to North and East Belfair; and

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the lack of an adequate plan for connectors between the sewer mains and the residential hook-ups in the outlying areas of the UGA. The County expects these to be provided by developers but has adopted development regulations that allow new urban levels of development on cluster or community septic systems without requiring connectors to be constructed to the sewer mains (current or proposed) from the new development. Community septic systems are not urban levels of service; like individual septic systems, they depend upon tanks and drainfields for disposal of human waste. While the residences on community septic are required to hook up to public sewer once the sewer connector lines are within 500 feet, there is no mechanism for ensuring that the sewer connector lines will come within 500 feet of the new development. Further, without financing for the sewer mains to serve East and North Belfair, new urban development on community septic systems could wait indefinitely for public sewer.

In a similar vein, Ordinance 91-07 allows new urban levels of residential development to occur on binding site plans without concomitant urban levels of service, especially public sewer. Urban levels of development under the GMA require urban levels of service. Stop-gap measures to allow development within a UGA before public services are available must avoid two major pitfalls: they must not allow urban levels of development before urban services are available to serve them; and they must not preclude eventual urban levels of development. Public sewer is often the most difficult urban service to provide but Mason County has made major strides in bringing public sewer to the Belfair UGA. Its challenge now is to avoid endangering its best plans by allowing new development that will undermine its ability to eventually serve the whole Belfair UGA with public sewer.

Because the community septic development regulations (MCC 17.03.030(B)(b)) and binding site plan development regulations (MCC 17.03.031) allow urban densities without urban sewer service, the Board finds them invalid. This in no way suggests a lack of confidence in the County's good faith; however, the continued validity of these development regulations

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substantially interferes with the fulfillment of Goal 12 of the GMA because it allows significant urban development without urban sewer services.

Financing for the public sewer plan in the Belfair UGA is partially complete – over $18 million in State funds have been allocated for Phase I. However, the unfunded portion of the initial phase of the Sewer Plan remains to be financed. No rate structure or connection charges have been established, although the Sewer Plan anticipates that those kinds of charges will be the mechanism for making up the financial deficit. Further, no strategy at all has been adopted for extending the sewer mains to East and North Belfair.

This compliance effort represents much hard work and responsible decision making by the County. Nevertheless, the County's work is not finished and more difficult decisions lie ahead.

II. PROCEDURAL HISTORY

The issue at this hearing was whether the County has achieved compliance regarding two conclusions of law reached in the Final Decision and Order dated August 14, 2006. Conclusion of Law J in the Final Decision and Order found a failure to ensure that public services will be available when urban levels of development are allowed in the Belfair UGA:

> The failure of Mason County's comprehensive plan and development regulations to ensure that public services will be available when urban levels of development are allowed in the Belfair UGA is clearly erroneous and violates RCW 36.70A.110(3), the concurrency goal (Goal 12) of the GMA (RCW 36.70A.020(12)), and the anti-sprawl goal (Goal 2) of the GMA.

Conclusion of Law K found that the capital facilities element of the comprehensive plan fails to demonstrate how public sewer in the Belfair UGA will be financed:

> The portion of the capital facilities element that describes the Belfair Area Sewer Improvement Project does not yet show how the County will finance public sewer capital facilities in the Belfair UGA within projected funding capacities, nor does it clearly identify sources of public money. It therefore fails to comply with RCW 36.70A.070(3)(d), and is clearly erroneous.

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This case was originally brought pursuant to a petition for review filed on February 13, 2006. In the Final Decision and Order, this Board found three areas of noncompliance:

- The failure of Mason County's comprehensive plan and development regulations to ensure that public services will be available when urban levels of development are allowed in the Belfair UGA is clearly erroneous and violates RCW 36.70A.110(3), the concurrency goal (12) of the GMA (RCW 36.70A.020(12)), and the anti-sprawl goal (2) of the GMA (RCW 36.70A.020(2)). (Issue 5(b))
- The portion of the capital facilities element that describes the Belfair Area Sewer Improvement Project does not yet show how the County will finance public sewer capital facilities in the Belfair UGA within projected funding capacities, nor does it clearly identify sources of public money. It therefore fails to comply with RCW 36.70A.070(3)(d), and is clearly erroneous. (Issue 5(c)).
- The capital facilities element and funding plan for storm water management in the Belfair and Allyn UGAs fails to comply with RCW 36.70A.070(3) because it does not contain a forecast of the future needs for stormwater management facilities; the proposed locations and capacities of expanded or new capital facilities; and at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes. These deficiencies are clearly erroneous and also fail to meet Goal 12 of the GMA. (Issue 5(c)).

Conclusions of Law J, K and L.

The Final Decision and Order set a compliance deadline of February 6, 2007 on all issues. On October 27, 2006, the County requested additional time to achieve compliance on all the issues. The Board found that the issues relating to the sewer and stormwater management plans are of unusual scope and complexity justifying an extension of time for compliance to August 6, 2007. However, the Board found that the issues related to development regulations to protect against incompatible development were not of unusual scope and complexity and therefore set a compliance deadline on those issues of February 6, 2007.[1]

[1] Order Granting Extension of Compliance Period, Denying Invalidity and Setting Compliance Schedules, November 7, 2006.

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On January 23, 2007, Mason County adopted Ordinance 10-07 amending Sections 1.03.030 and 1.03.031 of its Development Regulations.[2] Mason County offered Ordinance 10-07 as achieving full compliance on development regulations to protect against inconsistent development.

After a compliance hearing, the Board found that the County's development regulations were predicated upon a valid sewer plan, which was not yet adopted. In the Order Finding Noncompliance of Development Regulations To Protect Against Incompatible Development (May 14, 2007), the Board found that the County has not yet achieved compliance on this issue and again remanded it to the County to be addressed with the County's sewer plan compliance efforts.

On July 10, 2007, the County adopted Ordinance No. 78-07, adopting the Belfair/Lower Hood Canal Water Reclamation Facility Plan Supplemental Information, May 2007. On July 31, 2007, the County adopted Ordinance No. 90-07, amending the Capital Facilities Chapter of the Mason County Comprehensive Plan to include the Belfair/Lower Hood Canal Reclamation Facility Plan Supplemental Information; and Ordinance No. 91-07 amending Title 17 of the Mason County Code and Sections 1.03.030 and 1.03.031 of the Mason County Development Regulations for the Belfair and Allyn Urban Growth Areas. Ordinance Nos. 78-07, 90-07, and 91-07 were adopted to achieve compliance.

A compliance hearing was held in Shelton at the Memorial Hall on October 10, 2007. John E. Diehl represented ARD and John E. Diehl. The County was represented by deputy prosecuting attorney T.J. Martin, assisted by Director of Utilities and Wastewater Management, Emmett Dobey. All three Board members attended, Margery Hite presiding.

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[2] Mason County's Compliance Report and Index to Record Re: Development Regulations to Protect Against Inconsistent Development, February 12, 2007.

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At the hearing, the Petitioners made an oral motion to supplement the record with a June 20, 2007 decision of the Hearing Examiner. The Board denied Petitioners' motion since no justification was offered for failing to bring it earlier so that the County would have had an opportunity to respond to it at the hearing, at a minimum submitting it together with Petitioners' brief. The Board further found that the Petitioners did not make a showing that the decision of the Hearing Examiner was "necessary or of substantial assistance" to the Board in reaching a decision on the issues here.[3]

In response to Board questions, the County submitted a map post-hearing that overlays the proposed Belfair sewer system over the County Assessor's parcel map for the area. That map will be given Exhibit No. 471.

III. ISSUES PRESENTED

Issue No. 1: Do the Mason County comprehensive plan and development regulations ensure that public services will be available when urban levels of development are allowed in the Belfair UGA as required by RCW 36.70A.110(3), the concurrency goal (Goal 12) of the GMA (RCW 36.70A.020(12)), and the anti-sprawl goal (Goal 2) of the GMA?

Issue No. 2: Does the capital facilities element show how the County will finance public sewer capital facilities in the Belfair UGA within projected funding capacities, and clearly identify sources of public money as required by RCW 36.70A.070(3)(d)?

IV. BURDEN OF PROOF

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

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[3] RCW 36.70A.290(4)

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

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

RCW 36.70A.320(1).

This same presumption of validity applies when a local jurisdiction takes legislative action in response to a noncompliance finding; that legislative action is presumed valid. The only time that the burden of proof shifts to the County is when the County is subject to a determination of invalidity.[4] Here, no finding of invalidity was imposed so the burden remains on the Petitioners.

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

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

RCW 36.70A.320(3)

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

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

> In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter, the legislature intends for the boards to grant deference to the counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to

[4] RCW 36.70A.320(2) and (4).

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> take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201 (in part).

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

V. DISCUSSION

Issue No. 1: Do the Mason County comprehensive plan and development regulations ensure that public services will be available when urban levels of development are allowed in the Belfair UGA as required by RCW 36.70A.110(3), the concurrency goal (Goal 12) of the GMA (RCW 36.70A.020(12)), and the anti-sprawl goal (Goal 2) of the GMA?

Positions of the Parties

Petitioners argue that the County should not be found to have achieved compliance because it has adopted measures "not to ensure concurrency, but to ensure continued development without benefit of essential urban facilities, viz., sewer and a municipal sewage treatment plant."[5] The Petitioners point out that the new development regulations allow new development without connecting to public sewer "so long as the sewer lines are not extended to within 500 feet of the development," which is an indeterminate time.[6]

The County responds that it has removed all exemptions from the requirement to connect to public sewer when it becomes available.[7] The County also asserts that residential

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[5] Objections To a Finding of Compliance and Request for Determination of Invalidity at 1.
[6] *Ibid* at 3.
[7] Respondent's Response Re: Development Regulations To Protect Against Incompatible Development at 5.

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development is tied to the availability of urban services such that it is required to connect to public sewers as soon as they become available.[8]

Board Analysis

As the Board stated in its previous compliance order, the GMA requires that urban levels of service be available to serve urban levels of development.[9] RCW 36.70A.110(3), read together with Goal 12 (RCW 36.70A.020(12)), requires urban levels of service in urban growth areas:

> Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas. Urban growth may also be located in designated new fully contained communities as defined by RCW 36.70A.350.

RCW 36.70A.110(3)

> Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.020(12)

Because the lack of urban services within the UGA also precludes development at urban densities, the lack of urban services additionally threatens to create low-density sprawl in contravention of Goal 2, RCW 36.70A.020(2). See also the definition of "urban growth" in RCW 36.70A.030(18).

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[8] *Ibid.*

[9] Order Finding Non-Compliance of Development Regulations to Protect Against Incompatible Development, May 14, 2007.

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In Ordinance 91-07, the County has properly established urban densities for new development within the Belfair UGA.[10] As discussed above, the GMA requires that urban levels of development have urban levels of service. In response to this requirement, the County intends to ensure that there are adequate public sewer facilities in the Belfair UGA so that, eventually, all residences within the UGA will be connected to the public sewer system. The County has approached this goal by designing a sewer system that is sized for a ten-year build-out of the UGA at urban densities and that requires all properties to connect when public sewer is extended within 500 feet of their property. This is a tremendous achievement.

However, the County has also adopted development regulations that allow new residential development within the UGA at urban densities on community septic systems:

> New subdivision of land, including short-plats, will be allowed to use cluster systems, community drainfields and alternative methods of sewage disposal until public sewers are available within 500 feet of the closest property boundary subject to the following requirements:
>
> 1) Residential urban densities shall be at least four units/acre.
> 2) Location of sewer lines will be pre-located and easements established in accordance with Figure 10-1 of the Belfair/Lower Hood Canal Water Reclamation Facility Plan Supplemental Information (map Attachment "A").
> 3) No individual on-site systems will be allowed.
> 4) Gravity collection and transmission to a centralized treatment facility, such as community drainfields, a cluster system or an alternative system will be used as the preferred method of sewage transport unless approved by the Mason County Directors of Public Works, Utilities and Waste Management, and Public Health.
> 5) Community drainfields, cluster systems, or alternative methods of treatment will be required to deed to Mason County all system components. Once a public sewer line is available within 500 feet of a community drainfield, cluster disposal site, or alternative disposal system, the system must connect to the public sewer. After 100% subdivision connection is achieved, the site of the community drainfield, cluster disposal area or alternative system location can be abandoned and returned to the original developer, provided it is deemed to be safe and

[10] MCC 17.03.030(B**)(1)**

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free of contamination for construction by the Mason County Public Works Director. The cost to connect to the public sewer will be a component of the utility rate.

6) Property owners of subdivisions or short-plats served by community on-sites, cluster systems or alternative systems will pay a monthly utility rate as determined by the Director of Utilities and Waste Management. The rate will include charges for operation and maintenance, monitoring of the impacts of the systems on the environment, and the connection charges to the public sewer once available and appropriate administrative costs.

7) The use of community on-site treatment facilities and alternative systems will only be allowed with the creation of a permanent governance structure which may include the county, which owns and operates the collection, transmission and treatment facilities.

MCC 17.03.030(B)(b).

MCC 17.03.030(B)(b)

The Mason County Code does not itself define the terms "community drainfield", "cluster systems" or "alternative methods of sewage disposal" but instead incorporates and adopts the definitions of terms contained in Chapter 246-272 WAC.[11] Those regulations have been re-codified in Chapter 246-272A and 246-272B WAC which do not expressly define community drainfields or cluster systems either. However, Chapter 246-272A WAC regulates on-site septic systems generally[12], and Chapter 246-272B WAC regulates large on-site septic systems[13], so it is apparent that community drainfields, cluster systems and alternative disposal systems are on-site sewage systems.[14] Whether large or small, on-site

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[11] MCC 6.76.040

[12] WAC 246-272A-0001

[13] WAC 246-272B-0010.

[14] **"On-site sewage system" (OSS)** means an integrated system of components, located on or nearby the property it serves, that conveys, stores, treats, and/or provides subsurface soil treatment and dispersal of sewage. It consists of a collection system, a treatment component or treatment sequence, and a soil dispersal component. An on-site sewage system also refers to a holding tank sewage system or other system that does not have a soil dispersal component. WAC 246-2727A-0010

"Alternative system" means an on-site sewage system other than a conventional gravity system or conventional pressure distribution system. Properly operated and maintained alternative systems provide equivalent or enhanced treatment performance as compared to conventional gravity systems.WAC 246-272B-01001.

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septic systems are characterized by a collection system, a treatment component and a soil dispersal component (typically a drainfield).

The first question is whether on-site sewage systems are "urban services" appropriate for serving UGAs. The GMA defines "urban services" as "those public services and public facilities *at an intensity historically and typically provided in cities*, specifically including storm and sanitary sewer systems… *associated with urban areas and normally not associated with rural areas*." (emphasis added)[15] This means that urban services must both be typically provided in cities and also not normally associated with rural areas. "Urban services" in the GMA are contrasted with "rural services".[16] The definition of "rural services" provides that rural services do *not* include storm or sanitary sewers, except as otherwise authorized by RCW 36.70A.110(4).[17] If sanitary sewers are not rural services, then "sanitary sewer systems", as defined in the GMA as part of "urban services", do not encompass the traditional rural means of handling sewage, i.e. septic systems. This is consistent with the GMA definition of "urban services"; septic systems are also excluded under that definition because they are frequently associated with rural areas. We conclude, therefore, that under the GMA, septic systems, whether individual or community, are not considered "urban services".

The County has not claimed that community septic systems are urban services. Instead, the County intends to transition from septic to public sewer as the new sewer system is built and extended throughout the Belfair UGA. However, the County does allow new development to occur at urban densities on septic systems. MCC 17.03.030(B)(b) allows new urban development to occur on a community septic system of some sort within the Belfair UGA prior to the extension of public sewer. This means that fully urban densities will be planned (and constructed) without public sewer.

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[15] RCW 36.70A.030(19)
[16] RCW 36.70A.030
[17] RCW 36.70A.030(17)

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The County assumes that its requirement to connect when the sewer lines are within 500 feet of the property will eventually require all property within the UGA to connect to the public sewer as all the properties are developed. Since there is no timeline or financing for the extension of sewer beyond the Commercial Core, the areas outside the Commercial Core may be developed without even the prospect of public sewer within the three-year construction period planned for the Core.

The sewer plan for the Core, with the exception of an adopted financing plan as discussed in Issue No. 2 below, has a realistic expectation for completion based on the requirement to hook-up when public sewer is available within 500 feet. Exhibit No. 471, the overlay of the proposed sewer system on the Assessor's parcel map for the UGA, demonstrates a good likelihood that this would occur in the Belfair Commercial Service Area, [18] where the main lines and pumps for the sewer system are planned for construction in a "minimum of three years."[19] (This commercial area is also called the "core" or the SR-3 corridor.)

On the other hand, the areas east and north of the core UGA (North Belfair and East Belfair) [20] stretch far beyond the initial main lines. The entire UGA is approximately 2,400 acres but the initial phase of the sewer plan (for which most of the funding has been obtained) will only serve the commercial core.[21] Should North Belfair and East Belfair be developed on community septic systems, there is no likelihood that new development that is allowed to occur in this area could connect even within the 3 year period forecast for construction of public sewer in the Core. This is because the County assumes that future development in the eastern and northern portions of the UGA will connect to main lines that are not scheduled for construction according to any described time table or any funding strategy.[22]

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[18] Belfair/Lower Hood Canal Water Reclamation Facility Plan Supplemental Information (Ex. No. 444), Figure 7-1.
[19] *Ibid* at ES-9.
[20] *Ibid* at 7-2.
[21] *Ibid* at 2-1 and 10-2.
[22] *Ibid.*

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Further, MCC 17.03.030(B)(b)(5) only requires that the development on a community septic system connect to the public sewer system when the sewer is within 500 feet of the community drainfield or disposal site. Because of the size of the UGA, there is no assurance that sewer will be "available" within 500 feet of the new subdivision even when the second phase mains are built. Outlying new development on community septic is allowed farther than 500 feet from even those sewer mains that are planned to be available sometime later than 2011. Again the County assumes that connector lines will be constructed with each new development and therefore all new development in the UGA will eventually be within 500 feet of available sewer. However, since new development is allowed on the periphery of the UGA at any time, the County capital facilities or sewer plans do not assure that this assumption will be realized unless every property owner in the UGA decides to develop. In the absence of universal new development throughout the UGA, there could be gaps larger than 500 feet between a connector serving one new subdivision and the connector serving another new subdivision. There is no plan and no requirement for linking these connectors in the absence of new development and therefore a very real potential that the outlying subdivisions would be without public sewer for an indefinite period of time.

As a consequence, MCC 17.03.030(B)(b)(5) does not ensure that urban levels of sewer service will be available to serve the new urban development allowed. The most serious risks are posed outside the commercial core, where the proposed sewer mains are not funded and therefore not scheduled for construction. In addition, without a requirement that connectors be built from the new subdivisions to the sewer mains, there is no assurance that urban levels of sewer will ever be provided to new urban development located more than 500 feet from the planned and publicly funded sewer mains. For these reasons, MCC 17.03.030(B)(b)(5) does not comply with RCW 36.70A.020(12), 36.70A.110, and 36.70A.030(19) and (20).

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MCC 17.03.031

The new development regulations adopted in Ordinance 91-07 also allow residential development on binding site plans. The binding site plan provisions of Ordinance 91-07(MCC 17.03.031) apply to all new development in the Belfair and Allyn UGAs. MCC 17.03.031 requires that if there is new development prior to the provision of public sewer and water to a site, the approval for that new development must include a binding site plan which:

1) Complies with the applicable health regulations and other Mason County building regulations; e.g. critical areas, storm water management, etc.
2) Provides for future sewer pipelines and other utilities.
3) Demonstrates that development at the minimum density allowed within the zone could be achieved once public sewer and/or water would be available to serve the project site.

MCC 17.03.031(A).

There are three residential zones in the Belfair UGA – R-3 (three dwelling units per acre)[23], R-5 (five dwelling units per acre)[24] and R-10 (multi-family)[25] – and one mixed use zone[26] along the commercial corridor and cross-roads. Ordinance 91-07 (MCC 17.03.030(B)(b)(1)) requires that new residential subdivisions have densities of at least four units per acre. All of the residential zones set urban densities and thus require urban levels of service.[27] Binding site plans are a mechanism that allow some development to occur in the UGA at rural densities and intensities so long as that development does not preclude (and indeed plans for) urban densities and intensities *when urban levels of service are available.*

However, allowing new development to occur in a UGA prior to the availability of urban services requires a delicate balancing of two principles. On one side of the equation, the new development cannot be at urban densities because urban services are not yet

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[23] MCC 17.22.010
[24] MCC 17.22.060
[25] MCC 17.22.110
[26] MCC 17.23.120
[27] The R-3 zone is adjusted for the presence of critical areas and other factors limiting a higher density.

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available. On the other side of the equation, new development at non-urban densities must not preclude the eventual achievement of urban densities when urban services become available. Where a UGA is developed at non-urban densities and intensities due to a lack of adequate urban services, then it is unlikely to ever become urban in nature. Counties and cities need to ensure that new development which is not yet served by urban services does not become permanent sprawl or environmentally damaging if capital facilities planning assumptions do not come to fruition or if growth does not occur when and how it was expected.

MCC 17.03.031 addresses one of these two principles: the need to ensure that urban densities can ultimately be achieved by requiring the binding site plan to demonstrate how urban densities will be achieved once public sewer is available.[28]

The problem with MCC 17.03.031 is that it does not address the other principle: that urban densities may not be developed until they can be served with urban services. MCC 17.03.031 allows *urban* residential densities *before* urban levels of service are provided. Unlike the prior binding site plan provisions, this one places no restrictions on the densities and intensities of new development which may occur on binding site plans before urban levels of service are available. For this reason, it fails to comply with RCW 36.70A.110(3) and 36.70A.020(12).[29]

MCC 17.03.030(C)

Petitioners also fault the new provisions for obtaining an exception to the prohibition against developing a residence on an existing lot of record on a septic system (MCC 17.03.030(C)). However, these exceptions apply only to development on existing lots and are narrowly

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[28] MCC 17.03.031(A)(3)

[29] While the Board finds MCC 17.03.031 non-compliant, the Board notes that the language of MCC 17.03.031 suggests that the County intended to restrict development on binding site plans to rural levels of development until urban levels of service are available. If so, the lack of such a requirement could be readily cured by simply adding it to MCC 17.03.031.

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tailored to circumstances in which connection to a public sewer line are impractical. The Board does not find that such a narrow exception fails to comply with the GMA and defers to the County's choices on this point.

Conclusion: The provisions allowing the development of new residential subdivisions at urban densities on community (LOSS) septic systems (MCC 17.03.030(B)(b)) fail to comply with RCW 36.70A.110(3), 36.70A.020(2) and (12)36.70A.030(19) and (20). The provisions allowing urban densities to develop based on binding site plans before urban levels of service are available also fail to comply with RCW 36.70A.110(3), 36.70A.020(2) and (12), 36.70A.030(19) and (20).

> ***Issue No. 2: Does the capital facilities element show how the County will finance public sewer capital facilities in the Belfair UGA within projected funding capacities, and clearly identify sources of public money as required by RCW 36.70A.070(3)(d)?***

Positions of the Parties

Petitioners argue that the County has not planned for and financed its treatment facility and sewers to serve the entire Belfair UGA.[30] The County, Petitioners assert, only proposes a treatment plant and sewers to serve the core area of the Belfair UGA and even that will not be completed for three years.[31] There is no forecast, Petitioners allege, for when the full UGA might be served by sewers.[32]

At argument, the County explained that it has sized the sewer system components for full build-out of the UGA by planning for the 10-year population projections and created expansion options for the treatment plant. Phase I of the plan is projected to begin construction as early as 2008. The County expects future growth to finance subsequent expansions of the sewer into North and East Belfair.

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[30] Objections to a Finding of Compliance and Request for Determination of Invalidity, September 4, 2007, at 1.
[31] *Ibid.*
[32] *Ibid.*

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Board Discussion

Ordinance No. 78-07, adopted the Belfair/Lower Hood Canal Water Reclamation Facility Plan Supplemental Information, May 2007. Ordinance No. 90-07, amends the Capital Facilities Chapter of the Mason County Comprehensive Plan to include the Belfair/Lower Hood Canal Reclamation Facility Plan Supplemental Information (the "Sewer Plan"). Ordinance No. 90-07 provides that the comprehensive plan was amended to include the Sewer Plan in response to this Board's earlier decision, to show how the County would finance public sewer in Belfair within projected funding capacities and identify sources of public money.

RCW 36.70A.030(3) requires the capital facilities element of the County's comprehensive plan to inventory existing capital facilities, forecast future needs for capital facilities, describe the proposed locations and capacities of expanded or new capital facilities, contain at least a six-year plan that will finance such capital facilities and to require reassessment if the funding falls short of meeting existing needs, and to coordinate the financing plan with the capital facilities plan element:

> A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element, if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.[33]

[33] RCW 36.70A070(3)

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In the Final Decision and Order in this case, the Board found that the previous capital facilities plan failed to meet these requirements as to sewer and storm water management in the Belfair UGA.

The Sewer Plan[34] challenged here utilizes a 10-year planning period to size the treatment system alternatives and the pump stations and force mains.[35] The proposed system also includes gravity and low pressure sewer lines for Phase I to serve the core commercial area along SR-3, with unspecified "Future Phases" extending the force mains and gravity sewer lines into East Belfair and North Belfair.[36] The Sewer Plan only includes financing for Phase I of sewer construction.[37] There is no indication in the Sewer Plan of how future phases of the Sewer Plan might be financed or when.

The financing portion of the plan anticipates projects constructed from 2006-2009.[38] The 2006 basis for these costs is $24,545,000 (escalated cost $26,799,419).[39] Of that amount, $18,429.106 has been secured through a combination of state grants. The remainder, $8.4 million, "remains to be financed."[40] The Sewer Plan analyzes three "scenarios" for funding the initial capital costs of the system but does not adopt any one of them.[41] Since it lacks at least a six-year plan for financing the capital improvements needed to the sewer system for the Belfair UGA, the Sewer Plan fails to comply with RCW 36.70A.070(3)(d).

If, as seems likely, a financing plan can be adopted for Phase I of the Sewer Plan, then there is also a strong likelihood that the Commercial Core of the Belfair UGA will be served with public sewer under the County's plan. More problematic is the provision of public

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[34] Exhibit No. 444, May 2007.
[35] The Sewer Plan at ES – 5.
[36] The Sewer Plan at 10-2 and Figure 10-1
[37] The collection system is a combination of gravity and low pressure sewers and pump stations to include Belfair Commercial Area – 21,000 linear feet, one pump station. Sewer Plan at page 10-2
[38] Sewer Plan at 11-1
[39] *Ibid* at 11-1 to 11- 2.
[40] Sewer Plan at 11-7.
[41] *Ibid* at 11-8 to 11-12.

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sewer to East and North Belfair. No funding has been identified for construction of the additional mains to those areas, or for the expansion of the treatment facility and pumping stations to serve them.

The viability of the Sewer Plan is also linked to the development regulations that allow urban development throughout the UGA. As we noted above in Issue No. 1, urban services are required for new urban levels of development under the GMA. No rate structure or connection charges have been established and the unfunded portion of Phase I has not yet been addressed. Without the assurance of public sewer for the entire UGA during the planning period of the County's comprehensive plan, the capital facilities plan for the Belfair UGA does not comply with RCW 36.70A.110 (3), 36.70A.070(3)(e) or 36.70A.020(12).

Part of the promise of the GMA is that capital facilities planning will support land use planning. This promise is embodied in RCW 36.70A.070(3)(e), which requires a reassessment of the land use element "if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent." The County has the opportunity in its next phase of sewer planning to ensure that its capital facilities planning matches its land use planning.

Conclusion: The capital facilities element of the County's comprehensive plan, as amended with the Sewer Plan, makes major progress towards meeting the requirement to show how the County will finance public sewer capital facilities in the Belfair UGA within projected funding capacities. It clearly identifies some sources of public money for Phase I, but does not show how all of the initial capital facilities will be financed as required by RCW 36.70A.070(3)(d). Further, the County has not shown how intends to finance the unfunded capital facilities needed throughout the UGA, and therefore, does not comply with RCW 36.70A.110(3) and RCW 36.70A.020(12).

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VI. INVALIDITY

Positions of the Parties

Petitioners again request a finding of invalidity in this case.[42] They argue that "policies and regulations that allow continued development in a UGA, where there is no firm plan to provide essential urban facilities for sewage and stormwater management concurrently, interfere substantially with the GMA concurrency goal."[43] They also argue that the failure of concurrency violates goals 9 and 10 – conservation of fish habitat and protecting water quality.[44]

The County responds that its legislation provides for appropriate transitioning to urban levels of development and service.[45] The County notes that Ordinance 91-07 requires all persons to connect to public sewer within the Belfair UGA, regardless of the timing of the original site installation.[46]

Board Discussion

A finding of invalidity may be entered when a board makes a finding of noncompliance and further includes a "determination, supported by findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter." RCW 36.70A.302(1) (in pertinent part).

Where a local jurisdiction is making efforts to comply with Board decisions, the Western Board has looked to whether there is a reasonable risk that the continued validity of comprehensive plan provisions and/or development regulations that the Board has found noncompliant will make it difficult for the county or city to engage in proper planning. See

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[42] Objections to Finding of Compliance and Request for Invalidity
[43] *Ibid* at 2.
[44] *Ibid.*
[45] Mason County's Response t Petitioner's Objection to a Finding of Compliance and Request for Invalidity Re: Belfair Sewer Improvement System and Related Residential Development Regulations at 5.
[46] *Ibid.*

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Vinatieri v. Lewis County, WWGMHB Case No. 03-2-0020c and *Irondale Community Action Neighbors v. Jefferson County,* WWGMHB Case No. 04-2-0011, as examples.

We have previously rejected Petitioners' request for a determination of invalidity because we did not find there to be an imminent threat of significant inconsistent development which would substantially interfere with the County's ability to engage in GMA-compliant planning.[47] Now, however, the risk of significant inconsistent development is considerable. The provisions of MCC 17.03.030 that allow new urban levels of development on community septic systems provide a developer with an opportunity to construct urban subdivisions within the Belfair UGA without public sewer. The provisions of MCC 17.03.031 allow the use of binding site plans to accomplish the same thing. The potential of such residential development is very real because a developer need not wait for public sewer. Especially in those portions of the Belfair UGA that are not planned for sewer in the next six years, these provisions allow significant inconsistent development that may not be served by public sewer. While the spokesman for the County (Mr. Dobey) assured the Board that these provisions would never be used because it would be too costly to both construct a community septic system and connect to the public sewer, his assurance assumed the presence of sewer mains and connectors that are by no means certain. In fact, the use of either MCC 17.03.030(B)(b) and MCC 17.03.031 as a means of development at this time would reflect a reasoned belief that on the part of the developer that public sewer is not likely to be provided in the near future. Therefore, the continued validity of these provisions is only of use to a developer if the County is not able to provide public sewer in the foreseeable future.

The Board does not doubt the County's good faith. However, a development regulation that allows certain types of development is something upon which a developer can reasonably rely in deciding how and when to develop property. Because MCC 17.03.030(B)(b) and

[47] Order Finding Noncompliance of Development Regulations to Protect Against Incompatible Development, May 14, 2007.

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MCC 17.03.031allow urban levels of development without urban levels of service, therefore, the continued validity of MCC 17.03.030(B)(b) and MCC 17.03.031 substantially interferes with the County's ability to fulfill Goal 12 of the GMA.

VII. FINDINGS OF FACT

1. Mason County is a county located west of the crest of the Cascade Mountains that is required or chosen to plan pursuant to RCW 36.70A.040.

2. Petitioners were the original parties to the Petition for Review filed in this case.

3. In the Final Decision and Order issued in this case on February 13, 2006, the Board found that residential development at urban levels within the Belfair UGA is not tied to the availability of urban levels of service (Finding of Fact 31); that urban levels of residential development are allowed within the Belfair UGA before urban sewer service can be connected (Finding of Fact 32); and that the capital facilities financing plan does not yet show how the County "will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes."(Finding of Fact 35).

4. The Board further concluded:

> The failure of Mason County's comprehensive plan and development regulations to ensure that public services will be available when urban levels of development are allowed in the Belfair UGA is clearly erroneous and violates RCW 36.70A.110(3), the concurrency goal (Goal 12 of the GMA) (RCW 36.70A.020(12)), and the anti-sprawl goal (Goal 2) of the GMA.

Conclusion of Law J, Final Decision and Order (August 14, 2006); and

> The portion of the capital facilities element that describes the Belfair Area Sewer Improvement Project does not yet show how the County will finance public sewer capital facilities in the Belfair UGA within projected funding capacities, nor does it clearly identify sources of public money. It therefore fails to comply with RCW 36.70A.070(3)(d), and is clearly erroneous.

Conclusion of Law K. Final Decision and Order (August 14, 2006).

5. Mason County amended its development regulations applicable in the Allyn and Belfair urban growth areas (UGAs) on January 23, 2007 by adopting Ordinance 10-07.

6. After the Board issued its May 14, 2007 Order finding the amended development regulations violate RCW 36.70A.110(3), the concurrency goal (Goal 12 of the GMA) (RCW 36.70A.020(12)), and the anti-sprawl goal (2), the County adopted Ordinance

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No. 91-07. Ordinance No. 91-07 amends Title 17 of the Mason County Code and Sections 1.03.030 and 1.03.031 of the Mason County Development Regulations for the Belfair and Allyn Urban Growth Areas.

7. On July 10, 2007, the County adopted Ordinance No. 78-07, adopting the Belfair/Lower Hood Canal Water Reclamation Facility Plan Supplemental Information, May 2007. On July 31, 2007, the County adopted Ordinance No. 90-07, amending the Capital Facilities Chapter of the Mason County Comprehensive Plan to include the Belfair/Lower Hood Canal Reclamation Facility Plan Supplemental Information (the "Sewer Plan").

8. Ordinance No. 90-07 provides that the comprehensive plan was amended to include the Sewer Plan in response to this Board's earlier decision, to show how the County would finance public sewer in Belfair within projected funding capacities and identify sources of public money.

9. In Ordinance 91-07, the County has properly established urban densities of at least four units per acre for new development within the Belfair UGA.

10. MCC 17.03.030(B)(b)(3) prohibits any individual on-site septic systems as part of new development.

11. MCC 17.03.030(B)(b) allows new residential development within the UGA at urban densities on community septic systems.

12. Whether community or individual, on-site septic systems are characterized by a collection system, a treatment component and a soil dispersal component which is typically a drainfield.

13. Septic systems are the traditional rural means of handling sewage.

14. The County intends to transition from septic to public sewer as a new public sewer system is built and extended throughout the Belfair UGA.

15. Once a public sewer is available within 500 feet of a community drainfield, the community septic system must connect to the public sewer.

16. There is no mechanism for ensuring that public sewer will be available within 500 feet of new development in East Belfair and North Belfair.

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17. The plan for extension of sewer lines in the Commercial Core is based on a plan for construction of sewer mains and pumps to be constructed in the next three years.

18. The map of the Belfair Sewer System demonstrates a reasonable likelihood that the requirement for connecting to public sewer within 500 feet of any property will provide public sewer within the Commercial Core of the Belfair UGA because of the proximity of the properties to sewer mains planned for near-term construction.

19. The map of the Belfair Sewer System, on the other hand, does not show a reasonable likelihood that properties developed on community septic systems in North and East Belfair will connect to public sewer in the near future. This is because the eastern and northern portions of the UGA are planned to connect to main lines that are not scheduled for construction according to any described time table or any funding strategy.

20. The entire Belfair UGA is approximately 2,400 acres but the initial phase of the sewer plan (for which most of the funding has been obtained) will only serve the Commercial Core.

21. Since new development is allowed on the periphery of the UGA at any time, there could be gaps larger than 500 feet between a connector serving one new subdivision and the connector serving another new subdivision. There is no plan and no requirement for linking these connectors in the absence of new development and therefore a very real potential that the outlying subdivisions would be without public sewer for an indefinite period of time.

22. If North Belfair and East Belfair are allowed to develop on community septic systems, there is no likelihood that they could connect to public sewer even within the 3 year period forecast for construction of public sewer in the Commercial Core. This is because the eastern and northern portions of the UGA are planned to connect to main lines that are not scheduled for construction according to any described time table or any funding strategy.

23. MCC 17.03.030(B)(b)(5) does not ensure that urban levels of sewer service will be available to serve the new urban development.

24. Without a requirement that connectors be built from the new subdivisions to the sewer mains, there is no assurance that urban levels of sewer will ever be provided to new urban development located more than 500 feet from the planned and publicly funded sewer mains.

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25. The binding site plan provisions of Ordinance 91-07(MCC 17.03.031) apply to all new development in the Belfair and Allyn UGAs.

26. There are three residential zones in the Belfair UGA – R-3 (three dwelling units per acre)[48], R-5 (five dwelling units per acre)[49] and R-10 (multi-family)[50] – and one mixed use zone[51] along the commercial corridor and cross-roads. Ordinance 91-07 (MCC 17.03.030(B)(b)(1)) requires that new residential subdivisions have densities of at least four units per acre.

27. MCC 17.03.031 allows *urban* residential densities *before* there are urban levels of service.

28. Unlike the prior binding site plan provisions, MCC 17.03.031 places no restrictions on the densities and intensities of new development which may occur on binding site plans before urban levels of service are available.

29. MCC 17.03.030(C) requires all residential, industrial and commercial development currently using on-site disposal systems to connect to public sewer once a public system is extended to within 500 feet of the closest property line.

30. Development of an on-site septic system on an existing lot of record is precluded after January 31, 2009 unless narrow exceptions are met.

31. The Sewer Plan utilizes a 10-year planning period to size the treatment system alternatives and the pump stations and force mains. The proposed system also includes gravity and low pressure sewer lines for Phase I to serve the core commercial area along SR-3, with unspecified "Future Phases" extending the force mains and gravity sewer lines into East Belfair and North Belfair.

32. The financing portion of the Sewer Plan contains a plan for Phase I of sewer construction. There is no indication in the Sewer Plan of how future phases of the Sewer Plan might be financed or when.

33. The financing portion of the plan anticipates that the sewer projects will be constructed from 2006-2009. The 2006 basis for these costs is $24,545,000 (escalated cost $26,799,419).

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[48] MCC 17.22.010
[49] MCC 17.22.060
[50] MCC 17.22.110
[51] MCC 17.23.120

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34. $18,429.106 has been secured through a combination of state grants. The remainder, $8.4 million, "remains to be financed."

35. The Sewer Plan analyzes three "scenarios" for funding the additional $8.4 million in initial capital costs of the system but does not adopt any one of them.

36. The Sewer Plan lacks at least a six-year plan for financing all of the capital improvements needed to the sewer system for the Belfair UGA.

37. MCC 17.03.030(C) establishes exceptions to the prohibition against new development in the Belfair UGA on septic systems.

38. The exceptions in MCC 17.03.030(C) apply only to development on existing lots and are narrowly tailored to circumstances in which connection to a public sewer line are impractical.

39. Any Finding of Fact which is hereafter determined to be a Conclusion of Law is hereby adopted as such.

VIII. Findings of Fact Related to Invalidity

40. The provisions of MCC 17.03.030 that allow new urban levels of development on community septic systems provide a developer with an opportunity to construct urban subdivisions within the Belfair UGA without public sewer.

41. The provisions of MCC 17.03.031 allow the use of binding site plans to accomplish the same thing.

42. Especially in those portions of the Belfair UGA that are not planned for sewer in the next six years, these provisions allow significant inconsistent development that is not served by public sewer.

IX. CONCLUSIONS OF LAW

A. The Board has jurisdiction over the parties and subject matter of this case.

B. Petitioners have standing to participate in this compliance action.

C. MCC 17.03.030(B)(b) (allowing new urban development on large on-site septic systems) fails to comply with the requirements for urban levels of service to urban

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levels of development in RCW 36.70A.110(3), 36.70A.020(2) and (12), 36.70A.030(19) and (20), and is therefore clearly erroneous.

D. MCC 17.03.031 (the binding site plan provisions) fails to comply with RCW 36.70A.110(3), 36.70A.020(2) and (12)36.70A.030(19) and (20), and is therefore clearly erroneous.

E. The capital facilities element of the County's comprehensive plan, as amended with the Sewer Plan, fails to meet the requirements for financing of RCW 36.70A.070(3)(d) and is therefore clearly erroneous.

F. The continued validity of MCC 17.03.030(B)(b) substantially interferes with fulfillment of Goal 12 of the GMA (RCW 36.70A.020(12)) and MCC 17.03.030(B)(b)is therefore invalid.

G. MCC 17.03.031 substantially interferes with fulfillment of Goal 12 of the GMA (RCW 36.70A.020(12)) and MCC 17.03.031is therefore invalid.

H. MCC 17.03.030(C) complies with RCW 36.70A.110(3), 36.70A.020(2) and (12), 36.70A.030(19) and (20).

I. Any Conclusion of Law hereafter determined to be a Finding of Fact is hereby adopted as such.

X. ORDER

The County is hereby ordered to achieve compliance in accordance with this decision within 120 days of the date of this order. The following schedule shall apply:

Compliance Due	March 13, 2009
Compliance Report and Index to the Record (County to file and serve on all parties)	March 20, 2008
Any Objections to a Finding of Compliance Due and Any Motions to Supplement and/or Impose Invalidity Due	April 10, 2008
County's Response to Objections and Any Motions by Petitioners Due	May 1, 2008
Compliance Hearing (location to be determined)	May 8, 2008

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The Board advises the County that an earlier compliance date may be requested and a hearing held promptly if this would assist in the County's efforts to secure the needed funding for its sewer plan.

So Ordered this 14th day of November 2007.

_____
Margery Hite, Board Member

_____
Holly Gadbaw, Board Member

_____
James McNamara, Board Member

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

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

<u>Judicial Review</u>. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

<u>Enforcement.</u> The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all

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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, by fax or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

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

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