BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Michael Durland and Kathleen Fennell, Petitioners, v. San Juan County Council, Respondent.	Case No. 07-2-0013 **FINAL DECISION AND ORDER**

I. SYNOPSIS OF THE DECISION

Michael Durland and Kathleen Fennel challenge Ordinance 26-2007 (Ordinance) that adopted the Deer Harbor Hamlet Plan (Plan) and implementing development regulations. Petitioners allege that the Plan and regulations violate Goal 5, the Growth Management Act's (GMA) Economic Development Goal and Goal 6, the GMA's Property Rights Goal, because the Plan and development regulations do not allow all the uses previously allowed on Petitioner Durland's property as well some uses that are allowed in other Deer Harbor Hamlet (Hamlet) marinas. Additionally, Petitioners claim that the County's decision to direct new commercial uses to a Community Center Overlay District is ill-reasoned and therefore, arbitrary and discriminatory. Petitioners also allege that limiting certain research and educational facilities to properties of at least 20 acres deprives Durland of an existing property right and creates inconsistencies in the plan. Petitioners further allege that the County violated the GMA because it based the uses allowed in the Hamlet Industrial-B District on non-permitted existing uses and did not review the allowance of these uses for water polluting impacts. Petitioners ask the Board to require the County to require the owners of these alleged non-permitted uses to obtain permits.

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The record shows that the County's rationale to limit uses on Durland's property and to direct new commercial uses to a Community Center Overlay District was based on a public process where some desire was expressed for a community center in the Hamlet, but there was no consensus. The planning staff presented a rationale to the County Council for designating the Community Center Overlay zone and for separating commercial uses that attracted large numbers of people from industrial uses. Additionally, the existing uses on Durland's property can continue either as a conditional or nonconforming use, so his property rights are protected. For these reasons, we find that the Plan and the implementing development regulations do not violate Goal 6. The Board also finds that these decisions were within the discretion afforded the County, and do not violate Goal 5.

The compliant boundaries of the Hamlet were not changed by the Plan. Commercial, industrial, and residential uses were allowed throughout the Hamlet previous to Ordinance 26-2007's adoption. Therefore, the Board finds that we have no jurisdiction now to determine what uses –legal or not legal- existed in the Hamlet or to determine their appropriate location. Nor does the Board have jurisdiction to order the County to ask property owners to obtain permits. Additionally, the Board finds that the designation of several properties for industrial use does not trigger a review of water polluting impacts required by RCW 36.70A.070 for land use elements, as these uses were allowed throughout the Hamlet previous to the adoption of the Plan.

The Board does find that an inconsistency exists between the Plan, the Land Use Table for Existing Allowable Uses and the definition of Research Facilities that does not comply with RCW 36.70A. 070, RCW 36.70A.040, and RCW 36.70A130(4)(d). On remand, the County has an opportunity to correct this inconsistency to ensure that it does not deprive Durland of a private property right or violate RCW 36.70A.020(6).

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II. PROCEDURAL HISTORY

See Appendix A.

III. BURDEN OF PROOF

For the purposes of board review of the comprehensive plans and development regulations adopted by a 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 the local government.

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.

The statute further provides that the standard of review is 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,

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> 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 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 challenging the sufficiency of compliance efforts as well as in an initial petition for review, 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.

IV. ISSUES TO BE DISCUSSED

A. Is the Ordinance, Section 10, in violation of the GMA, RCW 36.70A.020(5) and (6) and RCW 36.70A.070 (5)(d)(i), by denying a permitted Marina located within HI-A the same development opportunities as provided by the other two Marinas in the Hamlet in an arbitrary and discriminatory manner?
B. Does the adoption of the Deer Harbor Plan and Ordinance 26-2007 violate the GMA, RCW 36.70A.070 Mandatory Elements ("The plan should be an internally consistent document and all elements should be consistent with the future land use map"), and GMA, RCW 36.70A. 106(2) ("Each county and city planning under this chapter shall transmit a complete and accurate copy of its comprehensive plan or development regulations to the department within ten days after final adoption"), by creating an inaccurate and internally consistent San Juan County Comprehensive Plan?
C. Is Ordinance, Section 14 (Definition E), in violation of the GMA, RCW 36.70A.020(5) and (6), by defining Research Facility to exclude all properties in the Hamlet of less than 20 acres, which would apply to only one property owner, arbitrary and discriminatory?[1]

[1] This issue is the second issue listed in the Amended Petition for Review and the Prehearing Order.

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D. Does the adoption of the Deer Harbor Plan and Ordinance 26-2007, Figures 1 and 4, violate the GMA, RCW 36.70A.020(10), and RCW 36.70A.070(1), by creating an Industrial Zone HI-B in a residential area by permitting industrial uses without reviewing drainage, flooding and stormwater runoff and providing guidance for correction actions to mitigate or cleanse those discharges that pollute waters of the state and without following Best Available Science for watersheds

V. DISCUSSION OF THE ISSUES

A. Is the Ordinance, Section 10, in violation of the GMA, RCW 36.70A.020(5) and (6) and RCW 36.70A.070 (5)(d)(i), by denying a permitted Marina located within HI-A the same development opportunities as provided by the other two Marinas in the Hamlet in an arbitrary and discriminatory manner?

Positions of the Parties

Petitioners allege that San Juan County did not consider permits or code violations and/or enforcement files in determining commercial or industrial use designations in the Deer Harbor Hamlet (Hamlet). Petitioners contend that the County ignored Petitioner Durland's legal right to his existing marina and did not allow him the uses allowed by other marinas in the Hamlet.[2] Petitioners argue that RCW 36.70A.070(3)(d)(iii) allows isolated cottage or home occupations and development or redevelopment of existing uses and does not allow for a Planned Unit Development (PUD) in the Hamlet. Petitioner maintains that the Growth Management Act (GMA) does not allow nor require mixed used areas, and is designed to maximize redevelopment of existing uses and minimize new uses. [3]

San Juan County argues that it made a reasoned choice to permit commercial uses in some areas and industrial uses in others and this does not violate GMA's property rights or economic development goals. The County states that provisions of Ordinance 26-2007 allows for the continuation of all existing uses, unless they are abandoned.

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[2] Petitioners Brief at 3.
[3] Ibid.

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The County explains that the Deer Harbor Hamlet Plan (Plan) created four new land use districts: Hamlet Industrial -A (HI-A), Hamlet Industrial –B (HI-B), Hamlet Commercial (HC), and Hamlet Residential (HR), as well as a Community Center Overlay District that is intended to be the focal point for new commercial uses.[4] The County maintains that the HI-A zone does not discriminate against Petitioner Durland, as some uses are permitted there that are not allowed in other districts.[5] The County contends that Petitioners have abandoned their argument that the Plan does not comply with RCW 36.70A.070(5)(d)(iii). Petitioners maintain that the Deer Harbor Boatworks and Marina has a legally recognized right to both industrial and commercial uses, including a marina. Petitioners assert that the County has not offered reasoned arguments why it can remove existing uses from his property and deny it the same opportunities that were granted to the two other marinas. Petitioners say that they have not abandoned the argument that the County's action does not comply with RCW 36.70A.070(5)(d)(iii).[6]

Board Discussion

<u>Alleged Violations of Goal 6, the Property Rights Goal</u>

RCW 36.70A.020(6) states,

> Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

San Juan County adopted a Deer Harbor Hamlet Plan in 1998 and has been in the process of revising it in fits and spurts since then. The process gained steam in 2006 and was completed in July 2007.[7] During this long planning process, San Juan County says it allowed residential, commercial, and industrial uses throughout the Hamlet pursuant to San Juan County Code 18.30.200 C.3[8] In contrast to this previous process, the 2007 Plan

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[4] Ibid.
[5] Ibid at 7-8.
[6] Petitioners' Reply to Respondent's Brief at 2 and 3.
[7] Index 031193.
[8] Brief at San Juan County at 3.

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adopted by Ordinance 26-2007(Ordinance) institutes new zoning for Hamlet that included new designations that are at issue here: Hamlet –Industrial A (HI-A), Hamlet Industrial B (HI-B), and Hamlet Commercial (HC). These designations generally limited uses in these designations to existing uses. Also, at issue is the Plan's establishment of a new Community Center Overlay District where the County envisions new commercial uses will be directed. At argument, Petitioners contended that the concept of a town center with commercial uses is unrealistic due to the cost of the land in Deer Harbor.

Petitioners allege the adoption of the Hamlet Plan and development regulations violate RCW 36.70A.020(6), the Growth Management Act's (GMA) property rights goal, in two ways:

(1) the limitation of new commercial uses at the Deer Harbor Boat Works and Marina property is arbitrary and discriminatory and

(2) (2) previously permitted commercial and recreational uses on Petitioner's property are not allowed to continue.

Achen v. Clark County, WWGMHB Case No. 95-2-0067c (*Achen*) includes an extensive discussion of Goal 6, the property rights goal, with the Board concluding,

> In attempting to define "arbitrary and discriminatory" actions, we note first that the Legislature used the conjunctive (and) rather than the conjunctive (or) form. This indicates that the legislative intent that protection is to be from actions that are ill-conceived, unreasoned, or ill-considered. The term discriminatory involves actions that single out a particular person or class of persons for different treatment without a rational basis upon which to make the segregation.
>
> The term "property rights of landowners" could not have been intended by the Legislature to mean any of the penumbra of "rights" thought to exist by some, if not many, landowners in today's society. Such unrecognized "rights" …such as the rights involving local government never having the ability to change zoning…are not included in the definition of this prong of Goal 6. [9]

[9] *Achen v. Clark County*, WWGMHB Case No. 95-2-0067c (Final Decision and Order, September 20, 1995) at 13.

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As discussed in *Achen*, Goal 6, the GMA property rights goal, does not limit the County's ability to designate property for certain uses or to change zoning. The record shows that extensive public discussion occurred about the concept of a community center, how to locate it as well as limitations on the location of commercial and industrial uses, and that a lack of consensus on those issues existed. [10] The record also demonstrates that the planning commission and the staff made recommendations concerning these issues based on this community input. [11] The staff laid out its rationale for locating the community center district for the planning commission and a rationale for community center district is incorporated in the plan. [12] Likewise, the staff presented a rationale to the County Council for not allowing some new commercial uses that attracted a large number of customers in the HI-A designation because that designation also allowed industrial uses. [13] County Council minutes confirm that the County Council considered the staff's recommendation. [14] Therefore, the Board cannot conclude that the County's decision was ill reasoned, ill-considered or ill-conceived.

At argument, Petitioners also expressed concern that some of the existing uses on Petitioner Durland's property had not been included in the Ordinance's Section 12, Table of Existing Uses, particularly professional offices and the Wooden Boat Festival, and therefore would be prohibited. The County replied to this concern by asserting that if the existing use was not listed in Table of Existing Uses in Section 12 of the Ordinance that it would be permitted to continue or changed as a nonconforming use pursuant to SJC 1840.310, or could possibly be expanded as a conditional use as an Un-Named Commercial, Industrial, Recreational, or Institutional Use. Uses in the Shoreline are subject to San Juan's Shoreline Master Program. The Ordinance confirms this, as well as SJCC

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[10] Index at 000504, 010371-010373, 031919.
[11] Record at 000504 and 000505, 010371-010373, 031195-031201.
[12] Record at 011235-031236.
[13] Record at 031197.
[14] Record at 031919, 031920.

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18.40.310. [15] Further, the Washington State Supreme Court, has ruled, "An ordinance prohibiting the enlargement of a nonconforming building is not subject to the same infirmity. This more limited restriction on the owner's rights in the use of his property is within the police powers and such ordinances have been held valid." [16] Here, the County has allowed the existing uses on the Durland property to continue as either conditional or nonconforming uses, with possibly the exception of Adult Educational Facilities, which we will discuss below.

Further, RCW 36.70A. 3201 states (in pertinent part),

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

The County's decision to direct new commercial uses to a community center zone and limit uses within HI-A zone is within the broad range of discretion granted to it by the legislature in accordance with RCW 36.70A.3201.

Conclusion: The County, through its public process, considered changes to various zones within the Hamlet and limited new commercial uses to a community center zone. The Board finds that the County's process for limiting uses on Petitioner Durland's property was not ill-conceived, ill-reasoned, or ill-considered. Therefore, the decision to limit uses on Durland's property and direct new commercial uses to the Community Center Overlay District is not arbitrary or discriminatory. Additionally, the Plan and the San Juan County code allow the existing uses on the Durland property to continue as conditional or nonconforming uses, pursuant to SJC 18.40.310, and in this way, protects existing property rights. For these reasons, we do not find that the Plan or the amendments to the development code adopted

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[15] Record at 031349.
[16] See *State ex. rel. Miller,* 40 Wn.2d 216 at 222, 242 P.2d 505 (1952).

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by the Ordinance violate RCW 36.70A.020(6). We find that these decisions are within the County's discretion pursuant to RCW 36.70A.3201.

Alleged Violations of Goal 5, Economic Development Goal and RCW 36.70A070(5)(d)(i). Petitioners argue that Ordinance 27-2008 disallows the expansion of existing uses on his property, and for that reason violates RCW 36.70A.020 (5) and RCW 36.70A.070(5)(d)(i). The County says that Petitioners have abandoned this argument. Petitioners disagree.

RCW 36.70A.020 (5) states,

> Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

RCW 36.70A.070 (5)(d)(i) defines a particular type of Limited Area of More Intensive Rural Development (LAMIRD) :

> Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows: (i) Rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.
>
> (A) A commercial, industrial, residential, shoreline, or mixed-use area shall be subject to the requirements of (d)(iv) of this subsection, but shall not be subject to the requirements of (c)(ii) and (iii) of this subsection.
> (B) Any development or redevelopment other than an industrial area or an industrial use within a mixed-use area or an industrial area under this subsection (5)(d)(i) must be principally designed to serve the existing and projected rural population.

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> (C) Any development or redevelopment in terms of building size, scale, use, or intensity shall be consistent with the character of the existing areas. Development and redevelopment may include changes in use from vacant land or a previously existing use so long as the new use conforms to the requirements of this subsection (5).

The Hamlet is considered an Activity Center by the San Juan Comprehensive Plan and meets the definition of a RCW 36.70A.070(5)(d)(i) LAMIRD. This LAMIRD's boundaries were found compliant with the GMA in 2001, and the Plan does not change the LAMIRD boundaries. [17] The Plan and the development regulation amendments instituted by Ordinance 26-2007 change the location of uses within the LAMIRD boundary, but not the building sizes, scale, or intensity of the uses, so does not violate RCW 36.70A.070 (5)(d)(i)(C). Likewise, the Board finds nothing in RCW 36.70A.070(5)(d)(i) that prohibits the use of a Planned Unit Development for infill development within the LAMIRD, as long as the scale, size, uses, and intensity conforms to the character of the existing LAMIRD.

Petitioners further contend that the Plan and development regulations violate RCW 36.70A. 070 (5)(d)(iii),[18] because it does not allow for expansion of an existing industrial use and therefore, violates RCW 36.70A.020(5). However, RCW 36.70A.070 (5)(d)(iii) defines another type of LAMIRD, isolated non-residential uses and cottage and small-scale industries that can be designated as stand-alone LAMIRD, as well as parameters for their expansion, and does not pertain to an industrial use within a RCW 36.70A.070(5)(d)(i) LAMIRD.

In addition to Goal 5 encouraging economic development, RCW 36.70A.070(5)(b) requires,

> The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation

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[17] Record at 0312209, *Town of Friday Harbor v. San Juan County*, WWGMHB Case No. 99-2-0010c (Compliance Order, May, 7, 2001).

[18] Petitioner's Brief at 3. The County moved to strike this argument on the grounds that the Petitioners did not cite this provision in their petition. While the Presiding Officer did not grant the County's motion to strike, the Board acknowledges that this provision is not relevant to the issue.

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> easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

The Deer Harbor Hamlet is part of the County's Rural Element. Here, the County has developed a sub-area plan that describes the Hamlet's rural character and includes development regulations to guide and regulate development in the Hamlet. As cited above, RCW 36.70A.3201 grants the cities and counties planning according to the GMA broad discretion to plan for growth in accordance with the goals and requirements of the GMA.

The ultimate responsibility for making the choices among the differing goals and priorities of County citizens rests with the County Council. In this instance, the Council had the burden of harmonizing the economic development goal with the requirements to preserve rural character as defined by the Plan. The Board can only determine whether the choices the County made are consistent with the goals and requirements of the GMA. The Board cannot substitute its judgment about what might be a better choice. [19]

Therefore, Board finds that the choices the County made in the adoption of the Hamlet Plan and development regulations comply with the goals and requirements of the GMA, are within the discretion afforded it by RCW 36.70A.3201, and do not violate RCW 36.70A.020(5).

Conclusion: The Plan and development regulation amendments adopted by Ordinance 26-2007 do not violate RCW 36.70A. 020(5) or RCW 36.70A.070(5)(d)(i).

B. Does the adoption of the Deer Harbor Plan and Ordinance 26-2007 violate the GMA, RCW 36.70A.070 Mandatory Elements ("The plan should be an internally consistent document and all elements should be consistent with the future land use map"), and GMA, RCW 36.70A. 106(2) ("Each county and city planning under this chapter shall transmit a complete and accurate copy of its comprehensive plan or development regulations to the department within ten

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[19] *Island County Growth Management Coalition v. Island County*, WWGMHB Case No. 98-2-0023 (Final Decision and Order, Order on Motions for Consideration and Clarification, July 8, 1999).

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days after final adoption"), by creating an inaccurate and internally consistent San Juan County Comprehensive Plan?

1. Minor Inconsistencies

Positions of the Parties

Petitioners declare that they have found over 20 spelling errors, word omissions, inaccurate wording and maps, and inconsistencies in the Deer Harbor Hamlet Plan and Ordinance. [20] These include the statement that there are two permitted marinas, when there are actually three, research facilities (structures) exist in the Conservation Easement, and five commercial establishments are present in the Hamlet, not three, as stated by the plan. [21]

The County responds that Petitioners fail to identify any internal inconsistencies with comprehensive plan elements or between comprehensive plan elements and the future land use map. The County acknowledges that it made typographical errors in the Plan. However, the County argues that the acknowledged typographical errors and the alleged inconsistencies do not create an internally inconsistent Plan or violate RCW 36.70A.070.[22]

Additionally, the County notes that Petitioners set forth no argument that the County did not transmit a complete and accurate copy of the Plan to the Washington Department of Community, Trade, and Economic Development (CTED) following adoption, so therefore, this issue should be considered abandoned. [23]

Board Discussion

At argument Petitioner Durland stated that many of the items that he noted in his brief concerning Issue C are not things that the Board should address. He stated that his major

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[20] Petitioners Brief at 8.
[21] Petitioners Reply to Respondent's Brief at 11.
[22] Brief of San Juan County at 12 and 13.
[23] Ibid at 13.

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concern was the Deer Harbor Boatworks and Marina is a permitted marina and this legally recognized right should be acknowledged in the Plan and the Ordinance.

The Board has addressed *supra* Petitioner Durland's concern that his legally recognized rights in his permitted Marina be acknowledged in the Plan and the Ordinance. The County has defined "existing allowable uses" on Petitioner's property that could be expanded with a conditional use permit. Uses on Petitioner's Durland's property that are no longer allowed in the HI-A zone, can continue as nonconforming uses. Changes in those uses are subject to SJCC 18.40.310. Uses in the Shoreline are governed by Title 18.50 of the San Juan County Code and Chapter 3 of its comprehensive plan. In this way, the County has addressed Petitioner's legally recognized rights.

Conclusion: It appears that Petitioners have abandoned their arguments concerning the Plan's minor discrepancies and typographical errors. Additionally, the Board agrees with the County that these errors do not create inconsistencies in the Plan or Ordinance or fail to comply with RCW 36.70A.070. We also can find no argument that addresses the County's failure to comply with RCW 36.70A.106. The Board finds that Petitioners have abandoned this issue.

2. Inconsistencies Regarding the Definition of Research Facilities

Positions of the Parties

Petitioners allege that the plan is internally inconsistent because the Land Use Table allows Research Facilities in Residential, Commercial, and Industrial Zones, but the definition limits research facilities to properties of only 20 acres. Petitioners argue that the limitation in the definition is arbitrary and discriminatory, because it limits this type of facility to only one piece of property in the Hamlet.

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The County says that the Land Use Table in Section 10 and the definition in 14. E adopted by Ordinance 26-2007 are development regulations. If there is a conflict between the Land Use Table in Section 10 and the definition in 14.E of the Ordinance 26-2007, these sections create an inconsistency among development regulations and do not cause an inconsistency among plan elements, so do not violate RCW 36.70A.070, the County contends. At argument, the County maintained that limiting the definition of Research Facility to 20 acres just made the definition more precise.

Board Discussion

The Board agrees with Petitioners. The Ordinance's Section 10, Table 2, Institutional Land Uses, allows Environmental, Agricultural, Marine, Forestry, Aquacultural Research and Education Facilities (Research Facilities) as a conditional use in the HR and the HI-A designations, and as a discretionary use in the HC designation. [24] These facilities are defined in the Ordinance, Section 14. E as follows:

> Structures used for research, development, and education of Environmental, Agricultural, Marine, and Forestry practices which are intended to restore and/or enhance the ecology of Deer Harbor and San Juan County. These facilities must provide central and communal living facilities and may not be located on parcels of less than 20 acres.[25]

The Plan describes Petitioner's Durland's property as being one acre. [26] Therefore, an inconsistency exists between Section 10, Table 2 and the Section 14.E, since the definition would not allow the type of facility on Petitioner Durland's property given its size.

From the Board's examination of the Plan, the Board finds that in Section 4 of the Plan, Action b under Policy 2 states:

> Encourage environmentally sensitive commercial ecotourism, visitor services that place an emphasis on Marine ecology, aquaculture, forestry, and ranching

[24] Record at 031944
[25] Record at 031354
[26] Record at 031237

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> by including the activity as a permitted use in Table 2 within the Institutional Land Use Section "Environmental, Agricultural, Marine, Forestry, Aquacultural Research and Education Facilities.

There is no reference here, or anywhere else in the Plan, that the Board can find which directs these facilities to be limited to parcels of not less than 20 acres or to the Conservation Easement. Table 2 allows this type of facility as a conditional use in the HI-A and HR designations, and as discretionary use in the HC designation, without any specifications as to size.[27]

The County points out that the part of the GMA the Petitioners argue this inconsistency violates is RCW 36.70A.070, which requires elements of the plan to be consistent, and that Section 10, Table 2, and Section 14.E are development regulations. The Board notes that confusion could exist on whether the development regulations are part of the Plan.

At the Hearing on the Merits, the County asked that an edited version of the Plan be submitted. This version differs from the version of the Plan with the title "Deer Harbor Hamlet Plan" that was attached to the petition and to the County's brief as Exhibit G. The copy of the plan labeled Exhibit G included development regulations and Land Use Tables such as Table 2, and Appendices listing existing land uses that were not included in version of the plan submitted to the Board at the Hearing on the Merits as Exhibit O. Therefore, the Board can understand how the Petitioners, or any member of the public, could reasonably conclude that development regulations were part of the plan and an inconsistency between Table 2 and 14.E constituted a violation of RCW 36.70A.070.

Also, no ordinance accompanied Exhibit O, so it is difficult to ascertain the legal status of this version. Nevertheless, whether Table 2 and Ordinance Section 14.E are parts of the comprehensive plan or development regulations, the County should make them consistent.

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[27] Record at 031344.

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Likewise, Ordinance Section 10, Allowed Land Uses in the Deer Harbor Hamlet, is not consistent with Section 4, Policy 2, action b of the Deer Harbor Hamlet Plan.

Conclusion: Based on the foregoing, the Board finds that Section 4.1, Policy 2, Action b of the Plan and Section 14.E of the Ordinance 26-2007 create an inconsistency between the Plan and the implementing development regulations that does not comply with RCW 36.70A.040 and RCW 36.70A.130(1)(d). Also, the Ordinance, Section 10, Table 2, and Section 14.E are parts of the County's development code that are inconsistent so do not enable consistent implementation of the Plan. This inconsistency also violates RCW 36.70A.040 and RCW 36.70A.130(1)(d).

C. Is Ordinance, Section 14 (Definition E), in violation of the GMA, RCW 36.70A.020(5) and (6), by defining Research Facility to exclude all properties in the Hamlet of less than 20 acres, which would apply to only one property owner, arbitrary and discriminatory?

Positions of the Parties

Petitioners argue that the limitation to 20 acres in the definition of Research Facilities is arbitrary and discriminatory, because it limits this type of facility to only one piece of property in the Hamlet. [28]

The County states that the definition of Research Facility was purposely tailored to permit ongoing use of the Conservation Easement rather than to allow research in a broader area. The County also declares that the County declined to allow aquacultural research in a broader area because Deer Harbor has high fecal coliform counts and aquaculture research is not feasible there.[29]

Petitioners reply that the County has ignored the fact that an ongoing Olympia Restoration Project and an Invasive Green Crab Study is being currently being conducted on Petitioner

[28] Petitioners Brief at 7.
[29] Brief of San Juan County at 10 and 11.

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Durland's property, the Deer Harbor Boatworks and Marina.[30] Therefore, Petitioners argue that the County's statement that aquacultural research is banned from the Hamlet is erroneous. Petitioners state that they can find no evidence in the record that the County Council made a choice to disallow environmental research in locations other than the Conservation Easement or directed staff to write a definition that would not permit research facilities in areas impacted by contamination.[31] Petitioners contend currently no structures exist in the Conservation Easement and that the Conservation Easement did not allow for research facilities in structures. [32]

Board Discussion

The record shows that the County considered making this change. A June 26, 2007 memo to the County Council from Ron Henrickson, Community Development and Planning Director, recommended the revision to Research Facilities that was adopted as Section 14. E. The memo states these were changes based on public input and gives the rationale as being to clearly identify the existing environmental and educational activities within the Conservation Easement discussed in the text of the plan. The Plan discusses activities now taking place in the Conservation Easement. The Plan states:

> Within this area, intense cultivated agriculture and nursery production predominate. Educational classes, projects, and field trips by pre-school through post graduate groups use the entire easement areas. Environmental, agricultural, marine, forestry aquacultural research and educational facilities are located in this area. Season agricultural, permacultural, and environmental educational seminars have been conducted with groups of up (sic) 50 camping on the western side of the easement. [33]

Petitioners also argue that no current research structures exist in the Conservation Easement and the Conservation Easement allows no structures for this purpose. [34] The

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[30] Petitioners Reply Brief at 2.
[31] Ibid at 10.
[32] Ibid at 9.
[33] Record at 031221
[34] Petitioners' Reply to Respondent's Brief at 9 .

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Plan shows that the Conservation Easement contains 11 parcels.[35] These parcels are grouped as "Parcel 1" and "Parcel 2". While no structures for Research Facilities are allowed on "Parcel 1", certain recreational and educational activities are. [36] The Easement Agreement does not contain restrictions for Research Facilities on "Parcel 2".[37] It also appears that one parcel of the parcels included in "Parcel 2" is 20 acres. The Petitioner and the County disagree about whether research facilities currently exist in the Conservation Easement. The Plan says there are, but it is not possible to ascertain from the record whether they in fact do exist.

Petitioners also contend that the County did not recognize on-going aquacultural research on Durland's property and the presence of fecal coliform has not curtailed this type research in the Hamlet. The County responded at argument that the research taking place on Petitioner's Durland's property is on tidelands regulated by the Washington Department of Natural Resources and not within the purview of the County.

The record shows a lack of consistency among the staff's recommendations, the Plan, and the development regulations. The Board has found above in Issue B that the Plan and development regulations lack consistency and there is a lack of consistency among development regulations. This lack of consistency, in both regards, makes it difficult to determine what the effect this inconsistency would have on the ability of existing facilities of this type to change or expand. However, the County has asserted and the Ordinance , Section 12 says that existing uses will be able to expand under a conditional permit and that nonconforming uses can continue.[38] Ordinance, Section 12, also recognizes Adult Education Facility as an existing use on Durland's property. [39]

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[35] Record at 031213.
[36] Ibid at 9.
[37] Ibid at 4 and 9.
[38] Record at 031349.
[39] Record ot 031351.

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The inconsistencies between the staff's recommendations, the Plan, and the development regulations make it unclear how the County intends to regulate Research Facilities. It is not clear whether these inconsistencies are a result of inaccurate drafting or intent to eliminate an existing use from Durland's property that would deprive him of an existing property right. Given this lack of clarity, on remand, the County has the opportunity to correct this inconsistency in a manner that does not violate RCW 36.70A.020(6). Therefore, based on the record, the Board does not find a clearly erroneous violation of RCW 36.70A.020 (6) at this time.

Based on our discussion of RCW 36.70A.020 (5) discussed under Issue A above, the Board finds that the County did not violate RCW 36.70A.020(5).

Conclusion: Based on the foregoing, the Board finds no clearly erroneous violations of RCW 36.70A.020 (5) and (6).

D. Does the adoption of the Deer Harbor Plan and Ordinance 26-2007, Figures 1 and 4, violate the GMA, RCW 36.70A.020(10), and RCW 36.70A.070(1), by creating an Industrial Zone HI-B in a residential area by permitting industrial uses without reviewing drainage, flooding and stormwater runoff and providing guidance for correction actions to mitigate or cleanse those discharges that pollute waters of the state and without following Best Available Science for watersheds.

Positions of the Parties

Petitioners argue that San Juan County failed to enforce County codes for non-permitted uses in a residential zone, then used these non-permitted uses to establish a baseline for uses to establish the HI-B zone in the Hamlet Plan, thereby legitimizing illegal uses. Petitioners contend that legitimizing the uses in the HI-B district undermines the goals of its advisory body, the Marine Resources Committee, and the San Juan County Marine Stewardship Plan, adopted by the County at the same time as the Hamlet Plan. Therefore, Petitioners make the following allegation: (1) the County violated RCW 36.70A.020(10) (the GMA's environmental protection goal) and (2) RCW 36.70A.070(1) by not having San Juan

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County or the Washington Department of Ecology review activities and proper stormwater permits. Petitioners also allege that the HI-B designations violate RCW 36.70A. 070 (1)(c)(iv) (sic) by not protecting the environment, surface water, drainage, flooding, and stormwater runoff. [40]

The County argues that industrial uses were permitted on the property now designated as HI-B. The County states that all uses, including existing permitted uses, must comply with development standards in SJCC 18.60, including storm drainage standards, before and after the adoption of Ordinance 26 -2007. [41]

In reply, Petitioners request that the Board clarify whether to meet the criterion established in RCW 36.70A. 070 (5)(d)(v) that the existing use must have been first a legally conforming use or legally existing nonconforming use under the applicable County code prior to the adoption of the GMA. Petitioners request that the Board direct San Juan County to require the owners of HI-B to conform to all County codes and acquire the required permits to bring them into compliance with County and state codes.[42]

Board Discussion

Challenge to Lack of Permitting In HI-B zone

As to Petitioners' request that the Board require the County to oblige the owners of properties in HI-B zone to obtain permits for unpermitted uses. RCW 36.70A.280(1)(a) and RCW 36.70A.290(1) restrict the Boards authority to only hearing challenges of comprehensive plans and development regulations and other GMA related actions that are appealed within 60 days of the publication of the challenged action.

Conclusion***:*** The Board has no authority over permitting, so the Board has no jurisdiction to consider Petitioners' request pursuant to RCW 36.70A.280(1)(a) and RCW 36.70A.290(1).

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[40] Petitioners Brief at 10.
[41] Brief of San Juan County at 13 and 14.
[42] Petitioners Reply to Respondents Brief at 13.

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Illegal Uses and the Boundaries and Uses allowed in the Hamlet

Likewise, as we have stated above, the Deer Harbor Activity Center boundaries - a RCW 36.70A.070(5)(d)(i) LAMIRD - were found compliant by this Board in 2001[43], and have not changed. Therefore, because Hamlet boundaries are deemed compliant, we cannot now examine the uses that were used to determine this LAMIRD's boundaries pursuant to RCW 36.70A.290(1) or whether when the boundary was established, it complied with the GMA's requirement to recognize uses that existed, legal or unpermitted, in 1990. The Plan does not alter these boundaries.

Conclusion***:*** A challenge to the boundaries and uses considered to determine those boundaries is untimely pursuant to RCW 36.70A.290(1).

Consistency with the Marine Stewardship Area Plan

Petitioners claim that the designation of the properties in the HI-zone is not consistent with the goals and priorities of the Marine Stewardship Area Plan. The record contains no evidence that this plan is part of the County's comprehensive plan. The GMA does not require consistency with a document that is not part of the County's comprehensive plan. Conclusion: Petitioners have not carried their burden of proof that the Plan violates RCW 36.70A. 070 (1) and RCW 36.70A.020(10) pursuant to RCW 36.70A.320(2).

Compliance of the Plan with RCW 36.70A.070(1) and RCW 36.70A.020(10)

Finally, Petitioners claim that the County did not review drainage, flooding, and stormwater runoff nor did it provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state and without following Best Available Science for watersheds before designating the properties in the HI-B designation for industrial uses.

RCW 36.70A.070 (1) requires when it adopts its land use element the County review:

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[43] Town of Friday Harborv. San Juan County, WWGMHB Case No. 99-2-0010c (Compliance Order, May 7, 2001).

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> Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound.

Before the Deer Harbor Hamlet Plan and development regulations were adopted, the County says that commercial, industrial, and residential uses were allowed throughout the Hamlet, and regulated in accordance with SJCC 18.30.200. As discussed above, the Hamlet's Activity Center designation has been deemed compliant. The compliance of this part of the County's Land Use Element, , also includes compliance with RCW 36.70A.070(1). The County's development regulations for Hamlet are also currently compliant. These development regulations allowed for industrial uses of a certain scale and intensity throughout the Hamlet prior to adoption of the Plan. These requirements for development have not changed. The Board finds that allowing industrial uses now on only certain pieces of property, when they would have been allowed (not necessarily permitted) previously throughout the Hamlet, does not trigger a review of the Deer Harbor Subarea Plan required by RCW 36.70A.070(1) or violate RCW 36.70A.020 (10).

Again, the Board cannot determine if the current uses in the HI-B zone have permits. It is in the County's purview to determine whether these are uses that have received a permit, whether they should be allowed to continue, and under what conditions they can expand or intensify.

Best available science applies to the development of critical areas regulations, not to the process of determining zoning districts. RCW 36.70A.172(1). Similarly, the Board assumes Petitioners' claims that the HI-B zone does not comply with RCW 36.70A.070(5)(c)(iv), the statute that was attached as an exhibit to Petitioners' brief related to this issues. The Board agrees with the County that that compliance with this issue was not raised in the Petition for Review or included in the Amended Prehearing Order. Therefore, the Board can not consider it pursuant to RCW 36.70A.290(1).

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Overall Conclusion: Based on the foregoing, the Board finds that Petitioners have not sustained their burden of proof that the designation of the properties as HI-B does not comply with RCW 36.70A.070(1) or RCW 36.70A.020(10).

VI. FINDINGS OF FACT

1. San Juan County is located west of the crest of the Cascade Mountains and is required to plan in accordance with RCW 36.70A.040.
2. On July 17, 2007, San Juan County approved Ordinance No. 26- 2007 adopting the Deer Harbor Hamlet Plan and implementing development regulations.
3. Michael Durland and Kathleen Fennel participated orally and in writing in the process to adopt Ordinance 26-2007.
4. On September 24, 2007, Michael Durland and Kathleen Fennell filed a petition for review challenging various aspects of the Deer Harbor Hamlet Plan.
5. Petitioners filed an Amended Petition for Review on October 23, 2007.
6. San Juan County allowed residential, commercial, and industrial uses throughout the Hamlet pursuant to San Juan County Code 18.30.200 C.3 previous to the adoption of Ordinance 26-2007.
7. The Plan adopted by Ordinance 26-2007(Ordinance) institutes new zoning for Hamlet that included new designations that are at issue here: Hamlet –Industrial A (HI-A), Hamlet Industrial B (HI-B), and Hamlet Commercial (HC) as well as a Community Center Overlay District that is intended to be the focal point for new commercial uses.
8. The Ordinance's Section 10, Table 2, allows Unnamed Commercial, Institutional, Industrial and Residential the existing uses to continue and expand as a conditional uses, and the Ordinance's Section 12 allows nonconforming uses to continue pursuant to SJCC 18.40.310. Uses in the Shoreline are regulated by San Juan County's Shoreline Master Program and Chapter 3 of its comprehensive plan.

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9. The record shows that extensive public discussion occurred about the concept of a community center, how to locate it as well as limitations on the location of commercial and industrial uses, and that a lack of consensus on those issues existed.
10. The record also demonstrates that the planning commission and the staff made recommendations concerning these issues based on this community input.
11. The planning staff laid out its rationale for locating the community center for the planning commission and a rationale for community center is incorporated in the plan.
12. The planning staff presented a rationale to the County Council for not allowing some new commercial uses that attracted a large number of customers in the HI-A designation because that designation also allowed industrial uses.
13. County Council minutes confirm that the County Council considered the staff's recommendation.
14. The Deer Harbor LAMIRD's boundaries were found compliant with the GMA in 2001, and the Plan does not change this LAMIRD's boundaries.
15. The Deer Harbor Hamlet is part of the County's Rural Element.
16. The County has developed a sub-area plan that describes the Hamlet's rural character.
17. The Plan and the development regulation amendments instituted by Ordinance 26-2007 change the location of uses within the LAMIRD boundary, but not the building sizes, scale, or intensity of the uses.
18. Petitioners have abandoned their arguments concerning the Plan's minor discrepancies and typographical errors.
19. No Petitioners' argument that addresses the County's failure to comply with RCW 36.70A.106.
20. The Ordinance's Section 10, Table 2, Institutional Land Uses, allows Environmental, Agricultural, Marine, Forestry, Aquacultural Research and Education Facilities

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(Research Facilities) as a conditional use in the HR and the HI-A designations, and as a discretionary use in the HC designation.

21. Section 4 of the Plan, Action b under Policy 2 states: "Encourage environmentally sensitive commercial ecotourism, visitor services that place an emphasis on Marine ecology, aquaculture, forestry, and ranching by including the activity as a permitted use in Table 2 within the Institutional Land Use Section "Environmental, Agricultural, Marine, Forestry, Aquacultural Research and Education Facilities. "
22. The Ordinance, Section 14.E limits Research Facilities to 20 acres.
23. Section 12 lists Adult Education Facilities as an existing use in the HI-A zone.
24. The Plan says that Petitioner Durland's property in the HI-A zone is one acre.
25. The copy of the Plan labeled Exhibit G, with the title "Deer Harbor Hamlet Plan" included development regulations and Land Use Tables such as Table 2, and Appendices listing existing land uses that were not included in version of the plan submitted to the Board at the Hearing on the Merits as Exhibit O.
26. The Plan shows that the Conservation Easement contains 11 parcels, grouped as "Parcel 1" and "Parcel 2".
27. While no structures for Research Facilities are allowed on "Parcel 1", certain recreational and educational activities are.
28. The Easement Agreement does not contain restrictions for Research Facilities on "Parcel 2".
29. It also appears that one parcel of the parcels included in "Parcel 2" is 20 acres.
30. The record contains no evidence that the Marine Stewardship Area Plan is part of the County's comprehensive plan.
31. Compliance with RCW 36.70A.070(5)(c)(iv) was not raised in the Petition for Review or included in the Amended Prehearing Order.

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VII. CONCLUSIONS OF LAW

A. This Board has jurisdiction over the parties and subject matter of this petition.

B. Petitioner has standing to bring this appeal on the basis of their participation in the proceedings below and the timely filing of their Petition for Review.

C. The Plan and implementing development regulations do not violate RCW 36.70A.020 (5) and (6).

D. The Plan and development regulation amendments adopted by Ordinance 26-2007 comply with RCW 36.70A.070(5)(d)(i).

E. The challenge to RCW 36.70A. 106 is abandoned.

F. Section 4.1, Policy 2, Action b of the Plan and Section 14. E of the Ordinance 26-2007 create an inconsistency between the Plan and the implementing development regulations that does not comply with RCW 36.70A.040 and RCW 36.70A.130(1)(d).The Ordinance, Section 10, Table 2, and Section 14.E are parts of the County's development code that are inconsistent so do not enable consistent implementation of the Plan. This inconsistency also violates RCW 36.70A. 040 and RCW 36.70A.130(1)(d).

G. The Board has no jurisdiction to consider Petitioners' allegation regarding the County's failure to require permits for various uses in the Hamlet pursuant to RCW 36.70A.280(1)(a) and RCW 36.70A.290(1).

H. The Board has no jurisdiction now over the status of uses in the Hamlet pursuant to RCW 36.70A. 290(1).

I. Petitioners have not sustained their burden of proof pursuant to RCW 36.70A.320(2) that the designation of the properties as HI-B does not comply with RCW 36.70A.070 (1) or RCW 36.70A.020(10).

VIII. ORDER

San Juan County must take legislative action to bring the designation of the Deer Harbor Hamlet Plan and implementing development regulations adopted by Ordinance 26-2007

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into compliance with RCW 36.70A.070, RCW 36.70A.040, and RCW 36.70A.130(4)(d) in accordance with this decision within 120 days of this order. The following schedule will apply:

Item	Date Due
Compliance	July 21, 2008
Compliance Report	August 4, 2008
Objections to a Finding of Compliance	August 25, 2008
Response to Objections	September 16, 2008
Compliance Hearing	September 23, 2008

Dated this 24th day of March 2008.

_____
Holly Gadbaw, Board Member

_____
James McNamara, Board Member

APPENDIX A

San Juan County adopted the Deer Harbor Hamlet Plan and implementing development regulations with Ordinance 26-2007 on July 17, 2007. Michael Durland and Kathleen Fennel filed their petition for review on September 24, 2007. On September 28, 2007, the Board issued its Preliminary Notice and Schedule. A Prehearing Conference was held on October 18, 2008. Michael Durland and Kathleen Fennel represented themselves. Deputy Prosecutor John Cain represented San Juan County. Board Member Holly Gadbaw presided.

In response to discussion at the prehearing conference, on October 23, 2007, Petitioners submitted an Amended Petition for Review. A Prehearing Order was issued on October 26, 2007. Respondent filed a motion to amend the issues in the Prehearing Order and a motion to reconsider the Prehearing Order's requirement that the County provide the Index

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at the County's office on Orcas Island on November 2, 2007, and November 5, 2007 respectively. After receiving Petitioners' responses to both these issues, the Board issued an order denying Respondent's motion to amend the issues and rescinding the requirement that the documents in the Index be available at the County's offices on Orcas Island [44] and an Amended Prehearing Order.

The County filed its Index on November 7, 2007. Petitioners filed a response to the Index on November 19, 2007 with the following objections: the Index's items were not listed in chronological order, the Index did not include written transcripts of meetings, and the Index did not list the contents of certain files or include permit and enforcement files. On December 5, 2007, the County filed an amended Index. After requesting and receiving further information from the Respondent and Petitioners, the Board issued an Order on Items for Inclusion in the Index on December 21, 2007.

On January 10, 2008, the Board received Petitioners' Motion to Supplement the Record and Petitioners' Brief. The County filed a Motion to Strike Portions of the Petitioners' Brief along with its response to Petitioners' Motion to Supplement the Record on January 18, 2008. The Brief of San Juan County was filed on January 30, 2008. Petitioners filed their Reply to Respondent's Brief, Motion to Strike Respondent's Brief for being untimely, and another Motion to Supplement the Record.

The Hearing on the Merits was held on Orcas Island on February 12, 2008. Michael Durland and Kathleen Fennel represented themselves. Deputy Prosecutor John Cain represented San Juan County. Board Members James McNamara, Margery Hite[45], and Holly Gadbaw attended. Board Member Holly Gadbaw presided. At the hearing, the County made a motion to supplement the record with a revised version of the Deer Harbor

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[44] Order on Respondent's Motion for Reconsideration and to Amend the Issues.
[45] Board Member Hite resigned from the Board effective March 3, 2008.

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Hamlet Plan, listed as Exhibit O. Petitioners did not object. The County also presented a color version of maps from the Deer Harbor Plan as illustrative exhibits.

At the request of the Board, the County submitted a memo from Jan Flagan to Diana Moore regarding the storm drainage plan for the Cookston/Connor parcels and the 1995 Deed of the Conservation Easement in Deer Harbor on February 13, 2008. Michael Durland responded by letter to these documents on February 19, 2008.

Post hearing rulings

The County's Motion to Strike Portions of Petitioners' Brief and Petitioners' Motion to Strike Respondent's Brief are DENIED. Petitioner's Motion to Supplement the Record with the following items is GRANTED and will be entered in the Index with the following Index numbers:

- 050001 – Durland Permit
- 050002 – San Juan County Shoreline Master Program(select pages)
- 050007 – Marine Stewardship Vision Statement
- 050008 – Marine Stewardship Plan Goal G
- 050009 – San Juan Comprehensive Plan, Definition of Hamlets
- 0500010 – San Juan County 1979 Comprehensive Plan - nonconforming use definition
- 0500013 – San Juan County Code 18.40.310 Non- conforming use definition
- 0500014 – San Juan County Code 18.80.120 llegal Use Defined
- 0500015 – Department of Ecology Web Page – Marine Manager Ranking
- 0500017 – San Juan County Code 18.20 – Definition of Marina
- 0500018 – Building Plan for Deer Harbor Boatworks.
- 0500019 Deer Harbor Parcel Map – Marinas
- 0500020 – Deer Harbor Parcel Map – Carpenter
- 0500021 – Assessor Tax Information for Carpenter Property

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- 0500024 – Draft Plan Deer Harbor Marina Uses
- 0500025 – 2007 Draft Plan Marina Uses
- 0500027 – Assessor Tax Information for Cookston Property
- 0500028 – Assessor Tax Information for Connor Property
- 0500029 – July 18, 2007
- July 18, 2007 E-mail from Connor to Durland05 000030- excerpt from Order on Compliance (June 21, 2000) in Case No. 99-1-0005 [46]

Petitioners' motion to supplement the record with permit files for Deer Harbor Boatworks, Bellport Deer Harbor Marina, and Cayou Cay Marina, as well as permit and code enforcement files for Corey Cookston property are DENIED, as Petitioners did not provide any supporting documents.

The County's Motion to supplement the record with a revised Deer Harbor Hamlet Plan is GRANTED, and will be listed in the Index as Exhibit O. However, the references in this order will be the Deer Harbor Hamlet Plan submitted to the Board with San Juan County's Response Brief labeled as Exhibit G.

Also added to the Index are illustrative exhibits with the following Index numbers:

- Colored map of Figure 1, Deer Harbor Land Use Map – 0500031
- Colored map of Figure 2, Existing Land Use Map – 0500032
- Colored map of Figure 4, Environmentally Sensitive Areas – 0500033.

The January 28, 2005 Memo from Jan Flagan to Diana Moore regarding the Cookston property is given Index # 0500034.

The 1995 Deed of the Conservation Easement in Deer Harbor is given Index # 0500043.

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[46] This are not the numbers given to the items by the Petitioners' Motion. These are numbers that are given by the presiding officer according to the Amended Prehearing Order to avoid duplication of numbers of items in the Index.

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

Reconsideration. 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. Filing means actual receipt of the document at the Board office. 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.

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

Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person, 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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