

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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3 MICHAEL DURLAND, et al.,

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5 Petitioners,

6 v.

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8 SAN JUAN COUNTY,

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10 Respondent.

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12 FRED R. KLEIN,

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14 Petitioner,

15 v.

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17 SAN JUAN COUNTY,

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19 Respondent.

No. 00-2-0062c

ORDER GRANTING  
EXTENSION

No. 02-2-0008

ORDER GRANTING  
EXTENSION

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22 **I. SUMMARY OF THE DECISION**

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24 This matter comes to the Western Washington Growth Management Hearings Board (Board) on the  
25 request of San Juan County (County) for an extension of its compliance date in these cases. The  
26 Board held a telephonic hearing and reviewed a report from the County that provided a timeline for  
27 completing work needed to make the designation of Urban Growth Areas (UGAs) for Eastsound and  
28 Lopez Village compliant and that described development activity in the Lopez Village UGA. The  
29 Board also reviewed a reply to this report from Petitioner Ellis. Given the resources available and the  
30 daunting scope of the work needed to create compliant non-municipal UGAs on two islands, the  
31 Board finds that these cases are of unusual scope and complexity, justifying a more lengthy period of  
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1 time than originally anticipated to achieve compliance. With the continuance of the County's  
2 voluntarily imposed restrictions upon urban level development activity in these UGAs, the Board  
3 grants the County a 270-day extension of its compliance date to complete the necessary capital  
4 facilities planning.  
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## 6 **II. PROCEDURAL HISTORY**

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8 The compliance phase of these two cases has lasted for more than three years and has a complicated  
9 and contentious history. During this compliance phase, there have been changes in the Board's  
10 composition, as well as in the County's representative, planning staff, and a majority of the County  
11 Commissioners. For these reasons and because of the allegations about the nature of the  
12 development occurring in Lopez Village, the procedural history of this case is important background  
13 to this extension order. These cases involve the last remaining issues from Case Numbers 00-2-  
14 0062c and 02-2-0008.  
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17 The Board issued a Final Decision and Order in Case No.99-2-0010c and Case No.00-2-0062c, on  
18 May 7, 2001, finding that the County was not in compliance with the Growth Management Act with  
19 respect to the Lopez Village and Eastsound UGAs. In May 2002, the County adopted ordinances to  
20 comply with the Board's May 7, 2001 order. Petitioner Klein filed a Petition for Review alleging that  
21 these actions also failed to comply with the Board's May 7, 2001 order and the Growth Management  
22 Act (GMA). This case became Case No. 02-2-0008 and has been heard with Case No. 02-2-0062c.  
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25 On May 2, 2002, the County adopted Ordinance 6-2002 that prohibited subdivisions of more than one  
26 unit per five acres in the Lopez Village UGA until an analysis of water supply and capital facilities is  
27 completed.  
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30 On October 15, 2002 the Board issued a compliance order in Case Numbers 00-2-0062c and 02-2-  
31 0008. The Board ordered the County to bring the Lopez and Eastsound UGAs into compliance  
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1 within 180 days of that date. As guidance in achieving compliance, the County was ordered to do the  
2 following:

- 3 • Complete final growth boundary lines in the Lopez UGA after studies on water  
4 availability and saltwater intrusion are concluded.
- 5 • Complete a Lopez UGA capital facilities plan.
- 6 • Complete an Eastsound UGA capital facilities analysis with respect to wastewater and  
7 drainage services.
- 8 • Reconsider the Eastsound market factor.
- 9 • Reconsider the inclusion of the westernmost, low-density properties in the Eastsound  
10 UGA and establish appropriate urban densities for a non-municipal UGA.
- 11 • Reconsider incompatible uses in the Airport Overlay Zone.
- 12 • Provide a report on its progress toward compliance no later than April 2, 2003.

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15 On February 28, 2003, the Board consolidated 00-2-0062c with Case Numbers 99-2-0010c and  
16 03-2-0003. These cases were captioned as Case No. 03-2-0003c.

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19 The County submitted a progress report on April 2, 2003 and requested an extension of the  
20 compliance date of 180 days to complete its remand work for the designated UGAs. The Board  
21 received a request to deny the extension of the compliance deadline from Mr. Fred Ellis and Ms.  
22 Joanne Smith. The Board issued an order that extended the compliance date to October 15, 2003.

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25 On October 7, 2003 the Board issued an order separating the issues regarding accessory dwelling  
26 units (ADUs) and the issues that involved the noncompliant Lopez Village and Eastsound UGAs.  
27 The ADU issue is now being heard in Case No. 03-2-0003, and the UGA issues are being heard in  
28 Case No. 00-2-0062c and 02-2-0008 (this case was never consolidated with any case).  
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1 On October 15, 2003, the County provided a compliance report on the airport overlay issues and  
2 requested another extension of the compliance date for Lopez Island and Eastsound UGAs' remand  
3 work. After a compliance hearing and a hearing on the request for the extension, the Board issued an  
4 order on December 19, 2003 that found the airport overlay in compliance. The Board further  
5 required the County to provide a report that included timelines and a work plan for completing the  
6 compliance work, and evidence that development at urban densities was not occurring in the  
7 designated Eastsound UGA. The County provided a report on February 17, 2004 that included  
8 Ordinance 3-2004 as well as a timeline and work plan for completing the remand work. Ordinance  
9 3-2004 prohibits subdivisions of more than one unit per five acres in a large portion of the  
10 undeveloped periphery of the designated Eastsound UGA where sewer is unavailable, until this UGA  
11 is found compliant by the Board. On March 2, 2004, the Board issued an order that extended the  
12 compliance deadline until November 15, 2004.  
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16 On November 8, 2004, the County submitted another progress report and asked that the compliance  
17 deadline again be extended. On November 30, 2004, the Board held a telephonic hearing on the  
18 request for an extension. Mr. Cameron Carter represented the County. Mr. Martin Blackmon also  
19 attended for the County. Petitioners Fred Klein, John Campbell, and Fred Ellis appeared and  
20 addressed the Board. All three Board members attended. At the hearing, Mr. Ellis argued that urban  
21 levels of development were continuing to be allowed on the Lopez Island UGA. The Board directed  
22 the County to submit another report containing a timeline and work program for completing the  
23 remaining remand work and addressing Mr. Ellis' allegations. The County submitted this report on  
24 December 15, 2004. Petitioner Ellis was granted permission to respond to the County's report and  
25 did so on December 30, 2004.  
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### 28 29 30 **III. BOARD DISCUSSION**

31 In its request for an extension and at argument, the County stated that the lack of progress in  
32 completing the work necessary for making the Eastsound and Lopez Island UGAs compliant was

1 caused by rapid turnover in staff, and a consequent lack of institutional knowledge on the part of the  
2 new staff, which also led to the inability of consultants to obtain needed information to complete the  
3 necessary capital facilities planning work. The County urged the Board to grant the County another  
4 180 day extension for the consultants to complete their work, for staff to analyze the work of  
5 consultants and make recommendations to the Planning Commission and Board of County  
6 Commissioners, and to facilitate a thorough public participation process.  
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10 In response to Board questions about whether the County could realistically expect to achieve  
11 compliance of the designated non-municipal UGAs at this time, the County responded that the  
12 County Commissioners are committed to completing the necessary work to make the Eastsound and  
13 Lopez Island UGAs compliant. Petitioners Klein and Campbell supported both the creation of non-  
14 municipal UGAs to accommodate growth on the islands and the County's request for an extension of  
15 time to complete its work. Both of these petitioners stated that the designation of these UGAs, (and  
16 the Eastsound UGA in particular) furthered and reinforced GMA goals for preventing sprawl and  
17 providing for affordable housing. However, these petitioners urged the Board to give the County  
18 more than the requested 180 days, in the belief that more time would be necessary for the County to  
19 complete its work and provide adequate opportunities for public participation.  
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23 Petitioner Ellis voiced concern that the work necessary to make the Lopez Island UGA compliant was  
24 so complex and formidable that it would take several years for the County to complete it. He also  
25 alleged that development activity at a density of more than five units an acre was continuing to take  
26 place within the Lopez Village UGA. He argued at the hearing and in a response to the County's  
27 report mentioned below that either the County should abandon the Lopez Village UGA or that all  
28 development activity in the Lopez Village UGA should cease until the County had completed its  
29 capital facilities planning.  
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1 The Board notes with some concern that this compliance process has stretched out over several years,  
2 and in the last year progress has slowed due to staff turnover. However, we also understand that  
3 capital facilities planning, especially for water and sewer facilities, is complex and expensive, even in  
4 the best of circumstances. We acknowledge that the County has already spent a considerable amount  
5 of financial and staff resources on capital facilities planning for these UGAs. Our concerns about the  
6 viability of the process for making these UGAs compliant with the GMA are allayed somewhat by  
7 the timeliness and detail of the County's progress reports; its efforts to comply with other parts of the  
8 original order (chiefly the airport overlay district); the completion and/or progress it has made with  
9 respect to water, sewer, transportation, and stormwater planning for the UGAs; and the County's  
10 voluntary efforts to place limitations on urban development in the undeveloped portions of the UGAs  
11 where urban services are not available.  
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15 In response to the comments and recommendations for Board action made by Petitioner Ellis in  
16 regard to the Lopez Village UGA, the Board observes that our jurisdiction over actions of the County  
17 does not extend to reviewing permits issued by the County. RCW 36.70A.280(1). The only way the  
18 Board could halt development activity in Lopez Village would be through a finding of invalidity.  
19 Even so, invalidity is prospective, which means that it does not affect completed development  
20 applications that vest under state or local law before invalidity is imposed. RCW 36.70A.302.  
21 Further, the Board can not impose invalidity unless substantial interference with the goals of the  
22 GMA has been demonstrated. *Id.* In the case of the Lopez Village UGA, no request for invalidity has  
23 been made, let alone substantiated. Furthermore, the County limited subdivisions in Lopez Village  
24 to rural densities in May 2002, applicable in a large part of the UGA and where urban services are not  
25 available. The Board took notice of and commended the County for this action in the October 15,  
26 2002 order that found the designated Lopez Island UGA in continuing noncompliance, and it was  
27 clearly a reason that no finding of invalidity was entered at that time. See Final Decision and Order/  
28 Compliance Order (October 15, 2002) at 9 and 19.  
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1 In addition, the report submitted by the County on December 15, 2004 states that the development  
2 activity at a density of more than one unit per five acres in Lopez Village UGA cited by Petitioner  
3 Ellis was the result of subdivision applications that were vested before Ordinance 6-2002 was  
4 enacted, prohibiting subdivisions of urban densities in the undeveloped area of the UGA where  
5 urban-level services are not available. <sup>1</sup>  
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8 The timeline and work program that the County has submitted requests 270 days to complete the  
9 work necessary to achieve compliance. The work program shows that a large part of this time will be  
10 used to work with the Planning Commission and provide opportunities for public participation.  
11 Pursuant to RCW 36.70A.300 (3)(b) the Board has authority to establish compliance periods of more  
12 than 180 days for cases of unusual scope and complexity. We find that the requirements for creating  
13 compliant non-municipal UGAs on Lopez and Orcas Islands in these cases make them of unusual  
14 scope and complexity. In the more than three years that the County has been working on bringing the  
15 designated Eastsound and Lopez Island UGAs into compliance, the County has made slow, but  
16 steady progress in the expensive, time consuming, and complex process of developing transportation,  
17 stormwater, sewer, and water plans for these UGAs. The County has also put limitations on  
18 development to ensure that inappropriate development does not occur while it is completing its  
19 planning efforts. Because the history of this case shows that this planning process has been  
20 contentious, the County's suggested timeline necessarily and appropriately includes many  
21 opportunities for public participation, a critical part of this planning effort.  
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## 26 ORDER

27 Therefore, for the reasons listed above, pursuant to RCW 36.70A.300(3)(b), the Board hereby  
28 GRANTS the County a 270-day extension of its compliance deadline to complete the capital facilities  
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31 <sup>1</sup> Also, the report clarified that the other alleged inappropriate development activity in San Juan County is a single-family  
32 unit for which a permit had not been issued and which is allowed under the current allowed uses for Lopez Village.

1 planning necessary to bring the Eastsound and Lopez Village UGAs into compliance with the GMA,  
2 PROVIDED that the County continues to maintain its restrictions on urban levels of development in  
3 those UGAs during the period of remand. The following schedule shall apply:  
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5 Compliance Deadline	August 12, 2005
6 County Statements of Actions Taken 7 Due	August 30, 2005
8 Petitioners' Objections, if any, to a 9 Finding of Compliance	September 20, 2005
10 County's Response	October 11, 2005
11 Petitioners' Reply (Optional)	October 18, 2005
12 Compliance Hearing	October 26, 2005

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14 The period of remand shall extend until the Board enters its next order on compliance.

15 So ORDERED this 4<sup>th</sup> day of February 2005.  
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19 WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD  
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23 Holly Gadbow, Board Member  
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26 Gayle Rothrock, Board Member  
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29 Margery Hite, Board Member  
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