

**BEFORE THE WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD**

MICHAEL DURLAND, et al., )  
) No. 00-2-0062c  
Petitioner, )  
) FINAL DECISION  
v. ) AND ORDER  
SAN JUAN COUNTY, )  
)  
Respondent, )  
)  
and )  
)  
OPAL COMMUNITY LAND TRUST, et al., )  
)  
Intervenors. )  
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TOWN OF FRIDAY HARBOR, FRED R. KLEIN, )  
JOHN M. CAMPBELL, LYNN BAHRYCH, et al., ) No. 99-2-0010c  
)  
Petitioners, ) COMPLIANCE  
) ORDER  
v. )  
SAN JUAN COUNTY, )  
)  
Respondent, )  
)  
and )  
)  
JOE SYMONS, FRIENDS OF THE SAN JUANS, and )  
KAREN J. KEY SPECK, et al., )  
)  
Intervenors. )  
\_\_\_\_\_)

On July 21, 1999, we issued a final decision and order (FDO) in #99-2-0010c. A number of findings of noncompliance and invalidity were part of that order. On October 2, 2000, San Juan

County adopted amendments to its Comprehensive Plan (CP), Shorelines Master Program (SMP), Uniform Development Code (UDC) (the County's development regulations (DRs)) and Official Maps. Shortly thereafter the County filed a motion to find compliance and rescind/modify the determinations of invalidity found in the FDO. After a full hearing we entered an order on November 30, 2000, addressing the County's motion and the request from Petitioners to find further noncompliance and invalidity. Because of the short 45-day timeframe under RCW 36.70A.330(2), we were only able to address a limited number of issues in the November 30, 2000 order. We postponed the remainder of the issues for a later compliance hearing.

Numerous petitions for review (PFR) concerning the October 2, 2000, amendments (2000 amendments) were filed. We consolidated those PFRs into #00-2-0062c and scheduled the hearing on the merits (HOM) and compliance hearing for March 6 and 7, 2001. A prehearing order was entered January 3, 2001, listing 33 issues. The issues raised by the PFRs and remaining from the compliance hearing not covered in the November 30, 2000, order were the same. All procedural matters were resolved prior to the HOM. We will structure this FDO by category rather than by specific issues.

### **PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW**

Pursuant to RCW 36.70A.320(1), the 2000 amendments are presumed valid upon adoption. The burden is on Petitioners to demonstrate that the action taken by San Juan County is not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we "shall find compliance unless it determines that the action by [San Juan County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." In order to find the County's action clearly erroneous, we must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

### **UNINCORPORATED UGAs**

San Juan County designated two unincorporated urban growth areas (UGAs): Eastsound and Lopez Village. Substantial areas of these new designations came from the previous designations as rural "activity centers." The county denominated the unincorporated UGAs as "interim."

Petitioner Mudd, joint Petitioners Smith/Ellis, Petitioner Klein and Petitioner Campbell as well as Intervenor Opal Community Land Trust (Opal) had a variety of comments regarding the UGA designations. Mudd challenged both UGAs as noncompliant with RCW 36.70A.110. Those challenges involved alleged oversizing caused by designating areas within the UGAs that were predominantly undeveloped or underdeveloped. The UGAs contain minimum lot sizes of one-half acre or larger in approximately 40% of the Eastsound and 75% of the Lopez Village UGAs. Mudd claimed that many of the boundary line decisions used community residential preference as the predominant criterion. While Mudd specifically did not challenge the Office of Financial Management (OFM) population allocation that was assigned by San Juan County to the UGAs, she did challenge whether the County had sufficiently demonstrated a need for the amount of acreage included within the ultimate boundaries. Additionally, Mudd claimed that the County had no provisions for urban services including no capital facilities plan (CFP) analysis, groundwater provisions, compliance with countywide planning policies (CPPs) appropriate level of service (LOS) standards, State Environmental Policy Act (SEPA) compliance, public participation compliance and appropriate urban DRs, as well as failure to comply with RCW 36.70A.510 and .574 regarding standards for the areas surrounding the Eastsound (Orcas) airport.

Smith/Ellis challenged only the Lopez Village UGA claiming that it was not an area “characterized by urban growth” and that inadequate provisions for urban services (specifically water and sewer) analysis were contained in the record.

Klein contended that the Eastsound UGA was the result of a flawed process because the criteria of RCW 36.70.110(3) were not followed over the preferences of the residents of the area, that adequate land for the OFM projection had not been made available and that compliance with RCW 36.70A.060(1) was not achieved because minimum lot sizes of one-half acre abutted designated forest resource lands (FRLs).

Campbell observed that while the concepts of UGAs for Eastsound and Lopez Village were appropriate under the Growth Management Act (GMA, Act), the details of “boundaries, zoning, utilities and planning” still needed further work, as did transportation planning. Because of a lack

of sufficient commercial lands and affordable housing lands as well as a lack of open space lands, the Eastsound UGA was insufficient in area. Intervenor Opal generally concurred with the Campbell position. It also supported the concept of UGAs in both Lopez and Orcas Islands, but acknowledged that further planning was needed.

As a partial response to the FDO in #99-2-0010c, the County reanalyzed the noncompliant Eastsound and Lopez Village Activity Centers. The County recognized that continued use of the RCW 36.70A.070(5)(d) provisions for limited areas of more intense rural development (LAMIRDs) would not allow Eastsound and Lopez Village to be, as noted on p. 2 of the County's brief, "areas that can provide for the long-term needs for intensive services and high-density housing, and cannot be expanded to meet future needs." Thus, the County turned to the concept of establishing UGAs that would fulfill its need to plan for future population growth, efficient use of taxpayers' dollars for public facilities and services, address a severe affordable housing need and achieve compliance with GMA requirements concerning rural areas.

A very thoughtful analysis of the proposed UGAs was prepared by staff on August 9, 2000, and updated September 28, 2000 (UGA report) under Ex. 231029. Unfortunately, as pointed out by Petitioner Campbell, by the time that analysis was available many of the boundary line decisions had already been made. Petitioner Klein made a compelling case that the criteria of .110(3) were not appropriately followed, but were superceded by citizen preference. That observation was also noted in a letter from the Office of Community Development (formerly DCTED) in a letter dated September 13, 2000, noting that a community residential preference was not an appropriate criterion for sizing an UGA. Additionally, the record demonstrates that many of the important sizing recommendations from the UGA report were not followed.

Petitioners Mudd and Smith/Ellis have failed in their burden of proof to demonstrate that no UGA could be established at either Eastsound or Lopez Village because the areas were not "characterized by urban growth". The *concept* of establishing the two unincorporated UGAs not only complies with the GMA but it appears from this record to be the only viable alternative available to the County. The record shows that by adopting appropriate UGAs at these locations the County can reasonably expect to reduce the 84% rural to 16% urban ratio to a more appropriate 64% to 36% by 2020. It would also have a fighting chance of solving its severe

affordable housing problems and achieving compliance with the rural element goals and requirements of the Act.

The proper sizing of an UGA is not simply a density calculation. Here the County acknowledged in the UGA report that there were “non-urban” densities of one-half and one acre within the UGA. That is a matter for the County to address upon remand to ensure that proper sizing under RCW 36.70A.110 is achieved. The County must use GMA criteria, not simply the wishes of current residents.

In addition to the sizing noncompliance, the County has acknowledged that it did not address urban facilities and services through an analysis of capital facilities planning. While it has a CFP, the decision to designate the areas as UGAs was done without any updated or adequate inventory, estimate of current and future needs and adoption of methodologies to finance such needs. The record is replete with evidence that sewer and water issues in these designated UGAs are significant and will need large capacity and distribution improvements. The DRs adopted by the County provide that connections to upgraded sewer and water facilities are required within one year of “availability.” There is, however, nothing in the record that deals with the issue of when such availability is required or will occur. We recognize that particularly with regard to the Lopez Village UGA some creative approaches will be needed for upgrading public facilities and services. As we noted in *Dawes v. Mason County* #96-2-0023c (Order 1-14-99) the Belfair UGA was addressing some of the creative solutions needed. San Juan County may want to examine the Belfair situation.

The County’s brief makes a rather startling, and totally incorrect, statement that since water and sewer facilities are provided by individual serving agencies (non-profits, public utilities) there is no need for the County to include those budgets and/or plans in determining whether and where a proper UGA should be located. The GMA does not allow a County to designate an UGA and then assign the responsibility of fulfilling its requirements to some other entity.

The County also designated the two UGAs as “interim.” None of the PFRs challenged the County’s use of this designation. Therefore, we will not express any opinion on the issue of whether “interim” UGAs are authorized after adoption of a CP. In its brief, the County asserted

that it had complied with the provisions of RCW 36.70A.110, but during argument at the HOM it acknowledged that completion of the “final” UGAs was a “work in progress” and may or may not end up with the same boundaries as established in the 2000 amendments.

The County cannot use its misdesignation of “interim” to show compliance. Rather, regardless of whether the term “interim” is used, it is clear that all of the UGA goals and requirements must be completed before the County can comply with the GMA.

The County must complete its inventory assessment and funding analysis for public facilities and services before it ultimately decides on a proper UGA boundary. With the many questions contained in this record as to the adequacy of the proposed upgrades and other public facilities and services, the “sticker shock” of the costs involved may have a significant bearing on the UGA boundary line decision. A local government may not adopt an expansive UGA without recognizing and providing for the expansive costs of infrastructure.

In light of the work yet to be done on the UGAs and the fact that they do not comply with the Act, we do not address the public participation, SEPA, LOS and concurrency issues. San Juan County has rarely, if ever, suffered from too little public participation. We do not expect the next iteration of the Eastsound and Lopez Village UGAs to suffer the shortcomings experienced in the initial try. Likewise, we anticipate further SEPA analysis may be necessary particularly to deal with the financing and needs assessment for urban public facilities and services.

## **RURAL**

### **.070(5) Framework Analysis**

Recently we have had extensive FDOs in Skagit and Lewis Counties relating to compliance with RCW 36.70A.070(5). The following is an analytical framework setting forth the standards established by the Legislature for the rural element of the CP and/or DRs. We will hereinafter refer to RCW 36.70A.070(5) simply as (5) along with appropriate subsections as (a), (b), (c), (d), and (e). We will refer to the definitions in RCW 36.70A.030 solely by their subsection number.

In analyzing (5) we start with the definitions established by the Legislature.

(15) “Rural development” refers to development outside the urban growth area and outside

agricultural, forest, and mineral resource lands (RLs) designated pursuant to RCW 36.70A.170. Rural development *can* consist of a *variety* of *uses* and *residential densities*, including clustered residential development, at levels that are consistent with the preservation of *rural character* and the *requirements* of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas. (Emphasis supplied).

We note that (5)(b) *requires* a variety of densities and uses rather than *allows* them. Some essential standards are shown by this definition.

1. No UGA nor designated RL is to be included as part of the rural element. Additionally, agriculture or forest activities conducted in rural areas are not considered to be a part of rural development.
2. Development in the rural area can allow a variety of uses and residential densities including clusters. However, such uses and densities must be only at levels that are:
  - a. consistent with rural character (as defined in (14)) preservation; AND
  - b. consistent with the requirements of (5).

(14) “Rural character” refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

- (a) In which open space, natural landscape, and vegetation predominate over the built environment;
  - (b) That foster *traditional* rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;
  - (c) That provide *visual landscapes* that are *traditionally* found in rural areas and communities;
  - (d) That are *compatible* with the *use* of the land by wildlife and for fish and wildlife habitat;
  - (e) That *reduce* the inappropriate conversion of undeveloped land into *sprawling, low-density development*;
  - (f) That generally do not require the extension of urban governmental services; and
  - (g) That are consistent with the *protection* of natural surface water flows and ground water and surface water recharge and discharge areas.
- (Emphasis supplied).

Several characteristics and standards are set forth in this definition. The patterns of land use and

development ultimately developed by a County in its CP must involve certain characteristics.

1. The natural environment must *predominate* over the built or manmade environment (See WAC 197-11-718).
2. Traditional rural lifestyles including *rural-based* economies and opportunities are to be fostered.
3. Visual landscapes, those *traditionally* found in rural areas, must be provided.
4. The patterns of land use and development must be *compatible* with the use of the land by wildlife and *compatible* for fish and wildlife habitat.
5. Sprawling, low-density development must be *reduced*.
6. Generally the extension of urban governmental services are prohibited.
7. The land use patterns must be consistent with the *protection* of surface water flows and ground water and surface water recharge and discharge areas.

(16) “Rural governmental services” or “rural services” include those public services and public facilities *historically* and *typically* delivered at an intensity usually found in rural areas, and may include domestic water systems, fire and police protection services, transportation and public transit services, and other public utilities associated with *rural development* and normally not associated with urban areas. Rural services do not include storm or sanitary sewers, except as otherwise authorized by RCW 36.70A.110(4). (Emphasis supplied).

Certain characteristics are shown in this definition.

1. Storm and sanitary services are prohibited, except to alleviate an existing health or environmental hazard.
2. This definition and the definition of urban services found in (19) both include domestic water systems, fire and police protection, and transportation and public transit services. The distinguishing characteristic is that rural services must be “historically and typically delivered at an intensity usually found in rural areas.” Urban services are those that are provided “at an intensity historically and typically provided in cities,....”

The Legislative often uses the terms “historical” and “traditional” to define the essence of rural. As noted later such terms are intended to encompass more than what was present in the rural areas of a county before GMA.

Subject to the definitions, the Legislature requires counties to include a rural element in the CP

outside of UGAs and RLs. The Legislature recognized in (5)(a) that local circumstances are an important consideration “in establishing patterns of rural densities and uses.” This provision is consistent with the wide discretion allowed to local governments under the GMA. RCW 36.70A.3201.

However, that discretion was not intended by the Legislature to be unbridled. RCW 36.70A.3201 involves discretion that is “consistent” with the goals and requirements of the Act. (5)(a) requires a county (through a written record) to “harmonize the goals” and “meet the requirements” of the GMA. The language of (14), (15), and (16), emphasize that the patterns of uses and densities must be those which are “historical” and “typical” to rural areas. The Legislature did not say that whatever existed in a particular county on June 30, 1990, automatically became the existing rural character of that county. The Legislature has clearly said that the rural element must have parameters involving generalized historical and traditional “lifestyles” and “visual compatibility,” as well as the predominance of the natural environment, compatibility with wildlife and fish, protection of waters and the reduction of “sprawling, low-density development.”

(5)(b) requires that the rural element include rural development (15), forestry and agriculture in rural areas. A variety of “rural densities, uses, essential public facilities and rural governmental services” must be provided. To achieve such “a variety of rural densities and uses” clustering and other “innovative” techniques may be included. Those innovative techniques, however, must involve “appropriate rural densities and uses” that are *not* characterized by urban growth (17) and that are “consistent with rural character” (14).

Additionally, (5)(c) includes other requirements that must be included in the rural element “that apply to rural development [15] and protect rural character [14] of the area” established by a county. In the rural element a county must:

- (i) contain or otherwise control rural development,
- (ii) assure visual compatibility with the “surrounding rural area,”
- (iii) reduce sprawling low-density development,
- (iv) protect critical areas and surface water and ground water resources, and
- (v) protect against conflicts with RLs.

The requirements of (c)(iv) and (v) require that a county review its current policies and regulations to determine if they are sufficient to comply with subsections (c)(iv) and (v). If existing policies and regulations do not meet these requirements then a county has the duty to adopt new ones. If existing policies and regulations in place at the time of adoption of the rural element are adequate, no new ones are necessary.

To summarize, a county may allow and shall provide a variety of *rural uses and rural densities* that are consistent with the definition of rural character (14) and also comply with the requirements of (5)(a), (b), and (c). UGAs and RL designations are excluded, as are agricultural or farming activities in the rural areas (15). A variety of rural uses and rural densities, essential public facilities, and rural services are both allowed and required (15), (5)(b). Rural services must be “historically and typically” at an intensity not found in urban areas but found in rural areas. Traditional rural lifestyles, including rural-based economies are to be fostered. The natural environment is to predominate and rural visual landscape compatibility must be assured. Protection of critical areas and natural water flows and recharge and discharge areas, as well as compatibility of the uses and densities with wildlife and their habitat is required. Clusters and other innovative techniques may be allowed but must “accommodate appropriate rural densities and uses not characterized by urban growth” and be consistent with rural character (14). Rural uses and densities must be contained or otherwise controlled and must reduce existing sprawling low-density development in the rural area.

We turn then to the provisions of (5)(d) entitled “limited areas of more intensive rural development” (LAMIRD). It is clear that such areas are not “rural growth” because of the intensification element. Under the definition in (17) such areas are not urban growth.

Three different types of LAMIRDs are allowed under (d)(i), (ii), and (iii). The first sentence of (d) which subjects the LAMIRD to the “requirements of this subsection” means that except as noted in (d)(i) all the provisions of (5)(a), (b), and (c) apply to LAMIRDs. There are also additional specific requirements in subsection (5)(d) that apply to the three types of LAMIRDs.

The provisions of (c)(ii) (visual compatibility) and (iii) (reduce low-density development) do not apply to those LAMIRDS designated under (d)(i). This section does not allow increased low-

density development, but merely removes the reduction requirement. The logical outer boundary (LOB) provisions of (d)(iv) apply only to LAMIRDs designated under (d)(i). The Legislature clearly stated that (d)(iv) provisions apply to (d)(i) LAMIRDS. LAMIRDS designated under (d)(ii) or (iii) are defined and bounded by “lots” and thus LOB requirements are irrelevant.

(d)(ii) and (iii) both allow “new development” and “intensification of development.” (d)(i) LAMIRDS do not allow “new development” except as it may be part of “infill, development, or redevelopment.”

(d)(i) LAMIRDs consist of certain “existing areas” defined in (d)(v). The allowed uses and areas include commercial, industrial, residential or mixed-use areas “whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.” An “industrial area” is not required to be principally designed to serve the “existing and projected rural population.” Thus, all other (d)(i) LAMIRDs (commercial, residential, or mixed-use) must be principally designed to serve the “existing and projected rural population.” In designating and establishing LAMIRDs under (d)(i) a county must “minimize and contain” ((d)(iv)) the existing area or existing use. Prohibitions against including lands within the LOB that allow a “new pattern of low-density sprawl” for the existing area or existing use must be adopted ((d)(iv)).

In establishing the LOB for an “existing area” (but not for existing uses) under (d)(iv) a county is required to “clearly” identify and contain the LOB. That identification and containment must be “delineated predominately by the built environment,” but may include “limited” undeveloped lands. WAC 197-11-718 provides some guidance as to a proper definition of “built environment.” Nonetheless, we recognize that the reasons for including the term “built environment” in SEPA and in GMA are not necessarily co-extensive. We conclude that legislative intent, as determined from reading all parts the GMA with particular emphasis on (5) (d), means the “built environment” only includes those facilities which are “manmade,” whether they are above or below ground. To comply with the restrictions found in (d), particularly (d)(v), the area included within the LOB must have manmade structures in place (built) on July 1, 1990.

(d) (i) LAMIRDs, being neither rural nor urban, that allow existing areas or existing uses, must always be “limited” i.e., minimized and contained.

The provisions of (d)(v) (existing area or existing use as of July 1, 1990) apply to all LAMIRDs whether designed under (d)(i), (ii), or (iii). Thus, for any “intensification” allowed under (d)(ii) or (d)(iii) the designated use or area must have been in existence on July 1, 1990 (or later date under the provisions of (5)(B) or (C)). This restriction does not apply to “new development” authorized under (d)(ii) or (d)(iii). Anytime the phrase “existing” is used to define an area or use, the provisions of (v) (7-1-90) modify that phrase.

Once the existing area has been clearly identified and contained, a county must then, in drawing the LOB, address (A) the need to preserve “existing” (7-1-90) natural neighborhoods and communities, (B) physical boundaries, (C) prevent abnormally irregular boundaries and, (D) ensure that the public facilities and public services necessary to serve the LOB do not “permit low-density sprawl.”

Under (d)(ii) small-scale recreation or small-scale tourist LAMIRDs are authorized. Commercial facilities to serve those LAMIRDs are allowed. The intensification or creation of small-scale recreational or small-scale tourists uses must rely on a rural location and setting. Such LAMIRDs cannot include new residential development. The uses need not be principally designed to serve the “existing and projected rural population.” “Public services and public facilities” (12)(13) must be limited to those “necessary to serve” only the LAMIRD. Such public services and public facilities must be provided “in a manner that does not permit low-density sprawl.”

The LAMIRDs allowed under (d)(iii) authorize intensification or creation of “isolated cottage industries and isolated small-scale businesses.” Again, these need not be principally designed to serve the “existing and projected rural population” and non-residential uses. They must provide job opportunities for rural residents. Public services and public facilities have the same constraints as those provided under (d)(ii).

The allowance of small-scale recreational and small-scale tourist uses, isolated cottage industries and isolated small-scale businesses are also subject to the provisions of (5)(a), (b), and (c), as well as the definitions contained in (14) and (15).

Finally, in designating its LAMIRDs a county must always be aware of the prohibition contained in (5)(e):

“Exception. This subsection shall not be interpreted to permit in the rural area a major industrial development or a master planned resort unless otherwise specifically permitted under RCW 36.70A.360 and 36.70A.365.”

The definition of a master-planned resort is found in .360 and the definition of a major industrial development is found in .365(1).

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### **North Roche Harbor Activity Center**

Petitioner Steed challenged the designation of the North Roche Harbor Activity Center area. The Roche Harbor Resort (RHR) proper had previously been designated as a Master Plan Resort (MRP) and was not the subject of this appeal. The appeal centered on the adjacent multi-acreage properties that the County designated as a LAMIRD. That LAMIRD designation consisted of mostly two-acre parcels that had existing residences or existing subdivisions/shortplats (the doughnut) surrounding a significant acreage of undeveloped five-acre minimum parcel size lots (the doughnut hole). The County decided that under its criteria the area qualified as “more intensive rural development.” The County established the logical outer boundary (LOB) at the interface of the two-acre minimum size lots with the surrounding five-acre minimum size lots. The County also determined that both the doughnut and the hole would be subject to increased density development (or redevelopment) only if provisions for affordable housing were included. The undeveloped doughnut hole is owned by RHR. It is not, however, part of the resort area nor the MRP designation.

This designation involves the fundamental question of what is *intensive* rural development. The definition of rural development is found at RCW 36.70A.030(15) but the adjective intensive is nowhere specifically defined. The provisions of RCW 36.70A.070(5)(d) provide the criteria and implicit definition for this issue. That section provides that a CP rural element “may allow” LAMIRDs, “including necessary public facilities and public services to serve” the LAMIRD. Such designation under (i) involves the “infill, development, or redevelopment of existing... residential... areas...”. Such residential area is not subject to the (c)(iii) requirement for reducing inappropriate low-density sprawling development in the rural area. See framework analysis

beginning at p. 8.

Nonetheless, under the provisions of (d)(iv) a County must “minimize and contain” the existing areas of “more intensive rural development.” Existing areas must have a LOB that is “delineated predominantly by the built environment” but undeveloped lands are allowable “if limited.”

The massive doughnut hole owned by RHR does not constitute a “limited” undeveloped area. Rather, in the context of the LOB, it is the predominant feature. There was no built environment in this area as of July 1, 1990. There is none today.

Inclusion of the two-acre minimum size lots in the LAMIRD does not comply with the Act. Two-acre residential properties are not “intensive” rural development under the legislative intent set forth in RCW 36.70A.070(5). There is no commercial, industrial or mixed-use component to this completely residential area.

Additionally, the record clearly demonstrates that there are no adequate provisions for inclusion of “necessary” public facilities and services to the LAMIRD. Though there are as yet undefined “plans” to increase the treatment capacity of the Roche Harbor water system, there are no plans in existence to deal with the increases in capacity necessary to serve the LAMIRD. It is not accurate, as contended by the County, that such plans need not exist in the designation phase but only in the permitting phase. GMA requires “planning” to occur prior to designations as significant as a LAMIRD. It is not compliant for a County to designate and then hope or expect some other entity to solve the public facilities and services problems.

The North Roche Harbor LAMIRD designation is so egregious as to substantially interfere with Goals 2 and 12 of the Act. The County’s reliance on Goal 4, affordable housing, in the rural area has significant challenges as discussed *supra*, and does not save this designation from a determination of invalidity.

### **Deer Harbor Activity Center**

Petitioner Durland challenged the redesignation of his property in Deer Harbor to a minimum

two-acre lot size. He did not file a brief but did make an oral presentation at the HOM. We find that Petitioner Durland has not sustained his burden of proof of showing that the County was clearly erroneous in the Deer Harbor redesignation as applied to his specific lot.

## **Densities**

Many Petitioners challenged the general rural density designations resulting from the 2000 amendments. A variety of issues were presented. We will cover the major topics of those issues by subheadings.

Initially, some clarification of the requirements of the Act relative to the basic philosophical thrust of Petitioners' and the County's arguments is necessary. Much of the underpinning of Petitioners' arguments is based upon a statistical analysis for rural densities both as they existed before, and as allowed by, the 2000 amendments. Petitioners pointed out that the existing rural average lot size equals approximately 4 acres. Existing FRL lot size averages approximately 17.9 acres. With the impact of the 2000 amendments, Petitioners' statistics revealed that in the rural 5-acre designation areas, which constitute 68% of the County's rural land base, average lot size would still equal only 4.7 acres. In the 10-acre designation areas average lot size would equal only 8.8 acres and in the 15-acre lot size designation the average would only be 8.2. These statistics included existing vested parcels which were substantially more dense than the 2000 amendment designations allowed. One of Petitioners' arguments was that such resulting average lot sizes would not comply with the Act, particularly since more than 2/3 of the resulting lots were under 5-acre parcels and thus automatically constituted sprawl.

Neither the GMA, nor any of our decisions, has a minimum lot size that constitutes rural, rather than urban, development. Five acres is a guideline, not a bright-line, and is often an easy frame of reference to begin the analysis. It does not, however, end the analysis. Statistical averaging of existing and projected average lot sizes has value primarily as a starting point.

At various times in its briefing and presentation the County, as well as Intervenor Eagle Lake Development Limited Partnership, argued that a county had no duty to "rectify preexisting suburban land patterns." This is not an accurate statement of the duties imposed upon a county under the rural element provisions of the GMA and under Goal 2. Under RCW 36.70A.020(2) a

county has the duty to “reduce the inappropriate conversion” of *undeveloped* land (whether existing or allowable after GMA planning) into low-density development. RCW 36.70A.070(5) (c)(iii) requires reduction of the inappropriate conversion of “*undeveloped* land” (whether existing parcels or future allowances after GMA planning) into low-density development “in the rural area.” Existing, but not yet developed, parcelization reduction can take many forms from lot combination DRs to greater minimum lot sizes in appropriate areas. The ultimate question is whether San Juan County has adopted sufficient designations and DRs to fulfill the GMA requirement to reduce sprawling low-density development in the rural area.

The parties agreed to the use of updated GIS data to reach the varying statistical conclusion that each side put forth. We appreciate the cooperation of the parties to bring this information to the record in its most current and most clarifying form.

Petitioners noted the guesthouse (GH) issue amplified the statistics to even a worse case scenario than previously brought forth. Since GH allowances are not part of the issues in this case any speculation about their impact will be ignored. Petitioners also noted that the County had adopted a resolution to complete a total resource land analysis and potential redesignation within the next year. Whatever impact that may have on the other parts of the County’s CP cannot be considered at this point because it is speculative in nature. We note also that the County has much analysis to do on its non-municipal UGAs that might well involve significant departures from the “interim” boundary lines that are now in place.

What is clear is that if substantial changes to the GH issue, RL designations and/or UGA boundaries are made at some point in the future, the County must of necessity reassess its rural element to ensure that it continues to comply with the GMA. As set forth in the issues and the record in this case, except for the North Roche Harbor LAMIRD and the allowance of transient rental (TR) in resource lands (*supra*), we find the County has complied with the GMA in its rural element 2000 amendments.

The total acreage of San Juan County’s 175 islands is the least of any County in the State of Washington. Four major islands constitute almost the entirety of land in San Juan County. The fact that each island is surrounded by water distinguishes it from the landscapes involved in

mainland counties. There are 117,846 total acres of land of which 10,036 are within 200 feet of the shoreline. Rural lands amount to approximately 63,616 acres. Relatively few large acreage parcels remain in designated rural areas.

In the 2000 amendments the County substantially down-zoned about 75,000 acres of rural and RLs. Virtually no rural area outside of activity centers (and non-municipal UGAs) allow densities of more than one du per 5 acres. High and low-density lands are interspersed for each island. Each of the four major islands have unique characteristics that makes each almost an independent rural county for planning.

San Juan County is the only county in the State to use tax money for its own land bank conservancy projects. There are also private conservancy designated areas.

The County has also adopted design standards in its rural areas that limit impervious surfaces, provide for a significant amount of open space to be retained and prohibit development that would allow urban growth or demand urban services.

Petitioners accurately pointed out, and the County agreed, that the 2000 amendments provided for rural designations of 5-acre, 10-acre and 15-acre minimum lot sizes. The 20-acre minimum lot size for rural areas involved only one area and could not reasonably constitute a “variety” of densities when it involved such a miniscule portion of the County’s rural designated area.

Sixty-eight percent of the County’s rural land is now in 1:5 designation and 27% is in 1:10 designation for a total of 95%. Petitioners’ major contention was that a variety of densities as required by the Act could not exist when 95% of the rural lands contain only two separate classifications, both of which involve significantly less actual densities (3.4 and 7.1) than the CP would have the public believe.

The County’s response was that there was a significant variety between the 1:5s and 1:10s, as well as the other larger parcel sizes at least as to each of the four major islands. The County also pointed out that in its conservation DRs which limited impervious surfaces and maximized open space, no rural density bonuses were given. The County anticipates, with its 2000 amendments, a shift of the existing 16% of its population in urban areas to approximately 35% in the year 2020. Petitioners vociferously dispute that claim.

When the dust settled on all of these statistical analyses and maps the salient fact is that the 2000 amendments reduced future developable acreage from 85,000 in the 1998 noncompliant CP to only 38,000. San Juan County has unique circumstances involving many islands each unique to itself in development potential and non-potential. It has the smallest total land mass in the State. Under this record San Juan County has provided a variety of rural densities in the 2000 amendments.

### **RL Buffers**

Insofar as buffering of RLs has been presented as an issue by any challenger other than Petitioner Klein, we note that the only challenged area allowing new, less than 5-acre parcels adjacent to FRL, is Deer Harbor. The major thrust of Petitioners' argument was that the resulting average lot sizes of less than 5-acres did not provide adequate buffering.

The difference between the designated minimum lot size and the resulting minimum lot size is not significant enough under this record to sustain Petitioners' burden of proof. Petitioner Klein's challenge to the small portion of the Eastsound UGA boundary with less the 5-acre rural buffers is not sufficient to sustain his burden of proof.

### **Exceptions**

Petitioners challenged the exceptions to density requirements in rural and RLs on a number of grounds. Some of those challenges are not properly part of this order.

The challenge to the open space density bonus provisions involved in the "San Juan Valley Planning Area" provisions are not yet complete nor have they been adopted by the County for the area in question. We will await final action by the County and then address the issue if a PFR is filed.

The "subdivision by gift" provision of the 2000 amendments was merely a reorganizational exercise. The DR has been in effect for many years using exactly the same language as in the 2000 amendments. The provision has merely been shifted to a new UDC section. Without some change to a particular DR, we have no jurisdiction at this late date to rule on its compliance. The

same lack of jurisdiction applies to the Town of Friday Harbor's consistency claim.

There is some question as to whether the issue of compliance with GMA concurrency requirements was even addressed in the 2000 amendments. Petitioners have failed to sustain their burden of proving noncompliance regarding concurrency issues. We expressly do not address any of the issues in #01-2-0001 relating to amendments made in December 2000. That case is scheduled for a hearing on the merits on May 9, 2001 and these issues will be addressed at that time.

There is also some lack of clarity in this record as to whether the issues regarding density in the Conservancy designation (outside of shorelines) were appropriately challenged or even changed by the 2000 amendments. We find that the challenges were not appropriately brought forth and no jurisdiction exists to address those issues.

The 2000 amendments authorized property owners who held property as tenants-in-common prior to the adoption of the Official Maps on December 20, 1998, the option to apply to separate their land into individual ownership by December 31, 2002. This DR came about as a result of a small number of property owners' testimony during the public participation process. The County characterizes this exception as "extremely limited." Other restrictions apply to the decision on whether to grant the application. Petitioners complained that additional densities would result while no information nor analysis as to the impact of the additional density was contained in the record.

While we agree the information and analysis in the record is sketchy, we also recognize that the potential for additional density is very limited. Petitioners have not sustained their burden of proving that the County failed to comply with the Act as to this exception.

### **Rural Character**

Petitioners also challenged the lack of adequate analyses of appropriate densities to protect San Juan County's rural character. The County is facing a dilemma of making sure that it does not become a "rural museum piece". The County has made provisions to allow both housing and employment for all economic classes and continues to take whatever action is necessary to meet

the future challenges involved in this part of its vision statement. As the County noted, the rural character requirements of RCW 37.70A.070(5)(b) and (c), as well as the definition contained in RCW 36.70A.030(14), involves more than just preservation of the “natural” part of the rural area. Rather, while a county must assure that the “natural landscape” predominates, it also has a duty to “foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas”. Our review of this record leads us to the conclusion that Petitioners have not sustained their burden of showing the County has failed to comply with its rural character responsibility.

### **Transient Rentals**

The DR provisions for transient rental (TR) for either a single family residence (SFR) or a guesthouse (GH) is found in UDC § 4.19.3. An owner (or lessee) of a SFR and a GH may rent either, but not both, on a less than 30-day term if the property is located in an activity center district or a rural residential district. TR is allowed in a conservancy district only if the SFR or GH was used for transient rental on or before June 1, 1997. If the property owner can demonstrate fulfillment of that requirement, a provisional permit with conditions for parking, traffic, water, and septage may be issued.

For all TR no more than three guests per bedroom are allowed and no “unreasonable disturbances to area residents” may occur. No outdoor advertising signs are permitted and compliance with all local and state regulations, including business licenses and taxes, is required. If any food is to be provided, the requirements for a “bed and breakfast residence” (a different category of TR) must be met.

In CP 2.2.A.12 the County adopted a 2000 amendment changing the definition of TR as to SFRs and GHs from “commercial establishments” to ones that were to be “classified as a residential use for purposes of land use regulation.”

In other shoreline areas TR is allowed by conditional use permit. Ordinance #12-2000 specifically provides that as to shoreline areas, the ordinance is not effective until it is approved by the Washington State Department of Ecology (DOE) as a Shoreline Master Program (SMP) amendment under RCW 90.58.090. The County has indicated that it will publish a notice of

adoption when the ordinance becomes effective. We are not authorized to rule on the shoreline issues until that SMP amendment has been processed and decided by DOE, and a PFR has been filed. RCW 36.70A.280(1)(a).

Petitioners challenged both the CP and the UDC amendments. Many petitioners objected to the use of a “commercial” enterprise in both rural and resource designated areas. Petitioner Steed and others complained of the definitional change from commercial to residential. The definitional change from commercial to residential, under the record in this case does not lead to the conclusion of noncompliance as to rural lands. The County noted at p. 55 of its brief that for GMA purposes the “label attached to vacation rentals is not determinative.” Our analysis and findings involve TR allowances, not labels.

Petitioner Stevens contended that establishing different standards for SFR TR than those for bed and breakfast “residences” or bed and breakfast “inns” rendered the CPs and DRs internally inconsistent. The County pointed out that its different standards and requirements were based on the different types of uses for the three categories.

While petitioners challenge the potential increase in density from the allowance of TR and even long term rentals, the *density* issue is inextricably linked to the issue of existing and future GH construction. It is the addition of a second house on a five acre minimum lot size parcel that raises density concerns. The use to which that second house is placed, under the record in this case, has very little to do with whether increased density is allowed or has been appropriately analyzed. The County appropriately noted that while GH rentals were not allowed prior to December 1998, that restriction did not apply to the main residence

As the County pointed out, short-term rentals do not create buildings, sprawl, significant traffic problems or the need to establish urban level water or sewer services. Rather the “on-the-ground” impacts have already been established in the building of the SFR and/or GH. The “visual compatibility” and “rural character” issues likewise show that no particular changes to the current status of existing GHs has been shown by any of the Petitioners. We find that as to TRs in the rural zone, the County has complied with the GMA.

We cannot make the same finding with regard to allowance of TRs in designated RLs. The GMA requires a County to “discourage incompatible uses” (RCW 36.70A.020(8)) and to “assure” that adjacent lands not interfere with designated RLs (RCW 36.70A.060(1)). The County has simply not appropriately analyzed the impacts of TR in resource lands within the requirements of assuring no incompatible uses adjacent to and within such RLs. While such impacts may have minimal impacts to rural lands, they have significantly more impacts to RLs. *King County v. Hearings Board*, 142 Wn. 2d 543 (2000).

We further determine that allowance of TRs in RLs substantially interferes with Goal 8 of the Act and as such any provisions of the CP and/or DR that authorize TRs in RLs are determined to be invalid.

### **AFFORDABLE HOUSING**

In the FDO we found a lack of compliance as to the affordable housing issue and indicated that the County was to “complete the work necessary to encourage affordable housing.” As pointed out by Petitioner Campbell, in the 18 months following the FDO to the present, the County had completed some “exemplary planning.” As noted in the record the County has reasonably estimated that “at least 120 additional housing units affordable to very low and low-income households will be needed each year for the next 10 years.” The record likewise is clear that the current housing market is rapidly foreclosing new opportunities for “very low, low and moderate income groups” in San Juan County. While the County has the highest average per capita wealth in the State, the average annual wage in 1997 was only \$19,548. Intervenor Opal noted that an affordable multi-family housing area currently exists in Friday Harbor with an average per unit cost of \$85,000, resulting in a monthly rental payment of approximately \$900. To be “affordable” even this “modest” affordable housing area requires an annual income of over \$36,000. As noted in the County’s “housing needs assessment” the cost of land and construction “prohibits” investors from developing rental units and current rental rates are substantially above the ability of the “community’s working families” to pay.

In our previous orders in #99-2-0010c, we noted that the County’s emphasis on the ability of GHs in rural and resource areas to meet part of the need for affordable housing went beyond wishful

thinking. Existing and future use of GHs for rental purposes is not going to provide a realistic affordable housing component given the limited amount, and price, of rural land in San Juan County and the GMA restrictions for rural lands. As noted by Petitioner Campbell:

“It is unreasonable to imagine that any proportion of new affluent house development will include a guesthouse for affordable rental. It simply does not pay.”

The County has established a number of new policies in the 2000 amendments for the establishment of a Housing Trust Fund, the sale or lease of County-owned land for affordable housing, delivery of affordable housing programs through contracting with neighboring jurisdictions, density bonuses for affordable housing in the rural area, and the establishment of the concept of UGAs and affordable housing units in Eastsound and Lopez Village.

As noted by Petitioner Campbell, the County has complied with the Goal 4 requirement of “encouraging” affordable housing. Petitioner Campbell pointed out that:

“The assumption that ‘encouraging’ affordable housing will have a substantive affect on producing it is a misapprehension.”

Petitioner Campbell contended that while “encouraging” has been met, RCW 36.70A..070(2)(d) requires a County to “make adequate provisions for existing and projected needs of all economic segments of the community.” Thus, he concluded that affordable housing is not only a goal, but also a mandatory requirement.

Opal, a non-profit affordable housing provider on Orcas Island, has to date constructed 42 single-family homes in Eastsound that are permanently affordable for households earning less than 80% of the County’s median income. The average income for families in the 42 homes is 50 % of median income. As noted by Opal, the affordable housing issue in the rural areas has problems.

“The point is simply adding up the number of available acres and parcels is not alone sufficient to determine the viability of affordable housing. We cannot provide affordable housing by building one house here and another house there. We also do not have a sufficient supply of older building stock that can affordably be converted to affordable housing. To meet the demand for people already living on the islands and trying to do so affordably, we need parcels large enough to support clustered developments of 20 or more

homes.”

## **Rural Residential Clusters**

The County did not disagree with any of the Campbell and Opal statements. Rather, it recognized the need to provide a high-density locale in order to achieve affordable housing. As part of that requirement the County enacted UDC § 6.21 allowing for “Rural Residential Clusters.” That DR provides for a rural subdivision cluster with a maximum of 8 units along with restrictions to ensure minimal impact on rural neighbors. No urban-level facilities or services are allowed. The clusters are allowed only if they provide affordable housing for very-low, low and moderate income levels for at least 50 years for ownership housing and 20 years for rental housing. A maximum of 10 clusters containing a maximum of 100 units are allowed over the next decade. Ownership of a site for the clusters must be a “public or non-profit entity.”

The County restricted the clusters to designated rural areas of village residential, hamlet residential, rural residential and rural farm forest districts. Maximum density was limited to two units per acre with no authorization for an accessory dwelling unit (GH). Clusters and other developments are not allowed within 1200 feet of a § 6.21 cluster. Water quality, quantity and septic issues are addressed with rural standards of development

Petitioner Town of Friday Harbor challenged the § 6.21 clustering provisions. The Town contended that allowance of such “urban-like” development with “rural” facilities and services standards would not insure that at some point “urban level services will not be needed.” The Town contended that allowing one dwelling unit per 0.5 acre substantially interfered with Goal 12. Petitioners Bahrych, et al., likewise challenged the DR as allowing urban growth in rural areas.

The County, Opal and Campbell argued that the DR was compatible with rural development and consistent with rural character. The County claimed that the cluster provisions complied with RCW 36.70A.070(5)(b) to provide for clustering “that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.”

None of the petitioners have sustained their burden of showing that adoption of UDC 6.21 fails to comply with the Act. In RCW 36.70A.070(5) (b) the Legislature clearly authorized the County to “permit rural development”, with a “variety of rural densities.” In order to achieve compliance with the mandatory requirement for a “variety of rural densities” a County “may provide for clustering...that will accommodate appropriate rural densities...not characterized by urban growth and that are consistent with rural character.” The provisions of .070(5)(c) for containing such rural development, assuring visual compatibility and reducing low-density sprawling development, apply to the allowance of clusters in the rural areas. As noted above, the standards adopted by San Juan County comply with these requirements. Urban service standards are not allowed, very limited numbers and sizing of clusters are authorized, only limited areas are authorized to accept clusters and affordable housing provisions are required.

This record is clear that, absent some subsidized funding mechanism, development of significant affordable housing in the rural areas in San Juan County is not now likely to occur nor is there much chance of it in the future given the price of property in San Juan County. Sparsely created clusters in the rural areas that may not include urban-type public facilities and services are, as pointed out by Opal, a mere drop in the bucket and insufficient in and of themselves to satisfy the Act’s affordable housing goals and requirements.

Rather, the only realistic affordable housing compliance action is likely to happen in the Friday Harbor UGA or in the proposed UGAs for Eastsound and Lopez Village. As noted in the UGA section of this FDO, significant funding challenges need to be analyzed and provided for before UGAs boundaries are fixed. Those funding challenges will be exacerbated by the need to include affordable housing requirements.

Nonetheless, under the record as it exists here, we find that the County has complied with the Act as to affordable housing. Petitioner Campbell has requested that we direct the County to fund its affordable housing policies and requirements. We do not have such authority. As noted by the County, there is a question as to whether it has such authority. The County is working diligently to have the Legislature give it specific authorization to do more for affordable housing than has been done here. We are hopeful that such authority will be granted. We do find, however, that as to the GMA, the County has complied. The County has indicated it intends to carry on and if

possible to do more. We applaud San Juan County for its efforts heretofore and in the future.

### SEPA

Petitioners complained that no SEPA documentation had taken place after 1997, that new GIS information had only recently become available and that the increased densities and impacts from the exceptions allowed by the County had not been analyzed for environmental impacts. Thus, Petitioners complained the SEPA requirements of the GMA had not been fulfilled.

The County pointed out that many documents had been reviewed, including a new SEPA analysis of LAMIRDS and UGAs. Taken as a whole the record revealed that the information necessary for SEPA compliance was available to the decision makers.

The County also noted that as part of the 2000 amendments some 75,000 acres of property was down-zoned and that no “significant environmental impacts” resulted from the 2000 amendments.

An analysis of SEPA compliance for GMA purposes is based upon the same “clearly erroneous” standard as established for compliance. Petitioners have the burden of proof. The initial question for our review is whether Petitioners have shown that a “probable significant adverse environmental impact” is likely to result from the County’s action. This question presents some potentially interesting issues when a package of amendments (or even initial adoptions) deal with a variety of potential environmental impacts. While it is true that some 75,000 acres of rural and RLs in San Juan were down-zoned by the 2000 amendments, there were also some changes that have potential environmental impacts. Taken as a whole, there are no probable adverse environmental impacts from the 2000 amendments, but there may well be some from individual portions of the DRs.

Under this record we find that Petitioners have not demonstrated that these potential adverse impacts are “significant.” With a wealth of information contained in this record concerning potential impacts, for purposes of this hearing the County has complied with the SEPA requirements of the GMA.

**ORDER**

In order to comply with the Act, San Juan County must:

1. Establish non-municipal UGA boundaries using RCW 36.70A.110 criteria within 180 days.
2. Establish non-municipal UGA boundaries only after a complete capital urban facilities and services analysis.
3. Remove transient and long-term vacation rentals from designated resource lands within 60 days.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 7<sup>th</sup> day of May, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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William H. Nielsen  
Board Member

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Les Eldridge  
Board Member

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**Appendix I**

**Findings of Fact pursuant to RCW 36.70A.270(6)**

1. On October 2, 2000, San Juan County adopted amendments to its CP, SMP, UDC and Official Maps.
2. Included within the 2000 amendments was the designation of two non-municipal, unincorporated UGAs: Eastsound and Lopez Village.
3. The designations of the “interim” non-municipal UGAs fail to comply with the requirements of RCW 36.70A.110 as to sizing and allowable densities.
4. The designations of the “interim” non-municipal UGAs fail to comply with the Act because of a lack of analysis and compliance with the capital facilities planning requirements of GMA.
5. The North Roche Harbor LAMIRD designation does not comply with RCW 36.70A.070 (5)(d) because none of the area included within the LAMIRD is “intensive” rural development. Much of the area did not have any significant built environment on July 1, 1990.
6. The redesignation of the Deer Harbor activity center complied with the Act.
7. Average lot size in rural areas, including existing and future allowances, is sufficient under this record to comply with the requirements of the GMA.
8. The County has appropriately included a variety of rural densities given its limited rural land area and unique circumstances.
9. The densities involved in the rural element comply with the requirements of the GMA as to protection of rural character.

10. The allowance of transient rentals in rural areas complies with the GMA.
11. The allowance of transient rentals in resource areas does not comply with the GMA.
12. The actions taken by the County since the FDO in 99-2-0010c as to affordable housing comply with the Act.
13. The SEPA actions taken by the County for the 2000 amendments comply with the Act.

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**Appendix II**

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# **Finding of Fact and Conclusions of Law for Determinations of Invalidity pursuant to RCW**

## **36.70A.302(1)(b)**

### **Findings of Fact**

1. Appendix I is incorporated by reference.
2. The designation of the North Roche Harbor LAMIRD substantially interferes with Goal 2 and 12 of the Act.
3. The allowance of transient rentals in designated resource lands substantially interferes with Goal 8 of the Act.

### **Conclusions of Law**

4. The North Roche Harbor LAMIRD is determined to be invalid under RCW 36.70A.302.
5. The allowance of transient rentals in designated resource lands is determined to be invalid under the provisions of RCW 36.70A.302.