

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 FRIENDS OF SAN JUANS, LYNN BAHRYCH and
4 JOE SYMONS,

5
6 Petitioners,

7 v.

8 SAN JUAN COUNTY,

9
10 Respondent.

No. 03-2-0003c

**ORDER ON COUNTY'S
MOTION REGARDING
ORDINANCE 11-2006**

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12 This matter comes to the Board on the County's Motion to Clarify and/or Modify Previous
13 Orders of Invalidation and For Other Relief.¹ The County moves that the Board modify or
14 clarify its orders of invalidity as to how those orders relate to newly adopted Ordinance 11-
15 2006. The County asks that the Board find that Ordinance 11-2006 is a vesting ordinance,
16 adopted pursuant to RCW 19.28.095, over which the Board has no jurisdiction or, in the
17 alternative, find that Ordinance 11-2006 does not substantially interfere with the Growth
18 Management Act (GMA).²

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21 On August 11, 2006, Petitioners William Sherman, Lynn Bahrych, and Stephanie Johnson,
22 filed their Memorandum in Support of San Juan County's Motion to Clarify and/or Modify
23 Previous Orders of Invalidation and For Other Relief. No other party filed a response to the
24 motion by August 19, 2006, the deadline for filing a response to the County's motion
25 pursuant to WAC 242-02-534.
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28 In this decision, the Board agrees with the County and Petitioners that the Board has no
29 jurisdiction over Ordinance 11-2006 because this "Rules Ordinance" does not constitute a
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32 ¹ Motion to Clarify and/or Modify Previous Orders of Invalidation and For Other Relief, August 9, 2006

² *Ibid* at 1.

1 GMA action. The Rules Ordinance clarifies the County's rules for determining whether
2 rights have vested for the construction of a principal residence where an accessory dwelling
3 unit (ADU) has previously been lawfully established on the property. It does not amend the
4 comprehensive plan or any development regulation.
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6 7 **RELEVANT PROCEDURAL HISTORY**

8 On November 30, 2000, the Board found that the provisions of the County's 2000
9 comprehensive plan amendments that allowed for new guest house construction in rural
10 and resource lands failed to comply with the GMA and were invalid because the analysis of
11 the impacts of detached ADUs continued to be inadequate. *Town of Friday Harbor, Fred R.*
12 *Klein, John M. Campbell, and Lynn Bahrych, et al. v. San Juan County*, WWGMHB Case
13 No. 99-2-0010c (Final Decision and Order, November 30, 2000).
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16 On April 6, 2001, the Board issued an order clarifying the application of its imposition of
17 invalidity in the November 30, 2000, Final Decision and Order. *Town of Friday Harbor, Fred*
18 *R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San Juan County*, WWGMHB Case
19 No. 99-2-0010c (Order Clarifying Invalidity, April 6, 2001). In that clarifying order the Board
20 said:
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22 [w]e answer the County's question of whether the determination of invalidity also
23 prohibits the issuance of a building permit for the construction of a principle (sic)
24 residence if the property owners have previously constructed a guest house on the
25 property in the negative. However, the previously constructed or permit- vested
26 "guest house" must meet the definition of SCC 18.40.240. Otherwise the second
27 residence would fall within the determination of invalidity issued on November 30,
28 2000.

29 *Town of Friday Harbor, Fred R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San*
30 *Juan County*, WWGMHB Case No. 99-2-0010c, (Order Clarifying Invalidity, April 6, 2001)
31 at 3.
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33 On December 3, 2002, San Juan County adopted Ordinance 21-2002, which amended the
34 regulations for the construction of ADUs. Later, this case became Case No. 03-2-0003c

1 when it was consolidated with the case resulting from the petition that challenged Ordinance
2 21-2002.

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4 In its Final Decision and Order on the consolidated case, the Board found the County's
5 regulations that allowed ADUs in rural and resource lands to be noncompliant and invalid
6 because it did not count a freestanding ADU as a unit of density in rural or resource lands.
7 *Friends of San Juans, et al. v. San Juan County*, WWGMHB Case No. 03-2-0003c
8 (Corrected Final Decision and Order, April 17, 2003).
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11 On January 30, 2004, the County submitted a progress report to the Board. The report
12 stated that the County has appealed the Superior Court decision and that the County is not
13 accepting any applications for freestanding ADUs that do not conform to the Board's April
14 17, 2003, decision as modified by the Superior Court decision.
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17 On June 30, 2004, the Board issued an order finding continuing noncompliance and
18 invalidity and ordering the County to take official action to comply with the Board's April 17,
19 2003, order and to notify the public of that action.
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22 On July 9, 2004, the Board received Petitioners' Motion for Clarification or Reconsideration.
23 Petitioners alleged that the County is permitting a second single-family residence on lots in
24 rural and resource lands that contain a single family dwelling unit of 1000 square feet or
25 less. Therefore, Petitioners asked the Board to:

26 (1) direct the County immediately to discontinue its policy of permitting a second
27 single-family dwelling unit on all lands with existing dwelling units smaller than 1000 square
28 feet, and
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30 (2) direct the County to amend its ordinance within a specific time period to bring its
31 ordinances and policies into compliance with the GMA.
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1 On December 3, 2004, the Board found that Ordinance 21-2002 had not been amended
2 and that the Board could no longer accept, pending resolution of the County's appeal to the
3 courts, the County's "practice" of not issuing building permits that did not conform to the
4 Board's order as interim compliance in lieu of amending its ordinance because now
5 Petitioners dispute whether the County in fact is complying with this order when issuing
6 building permits for ADUs. Order on Issues for Reconsideration (December 3, 2004).
7 Therefore, the Board found Ordinance 21-2002 in continuing noncompliance and invalidity
8 and ordered the County to bring that ordinance into compliance within 120 days.
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11 The County adopted Ordinance 3-2005 on April 14, 2005. On July 21, 2005, the Board
12 found that the regulations established by the new ordinance still substantially interfered with
13 the RW 36.70A.020(2) and (8) because the regulations still did not require detached ADUs
14 to meet the underlying density requirements. The Board also stated in that order that the
15 Board's April 6, 2001, Order Clarifying Invalidity did not change the Board's Final Decision
16 and Order of November 30, 2000, but merely explained that rights vested prior to the
17 November 30, 2000, decision and order were unaffected by the imposition of invalidity in
18 that order. Compliance Order (July 21, 2005).
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22 On July 8, 2006, San Juan County adopted Ordinance 7-2006 that strictly limited the
23 number of permits that could be issued for ADUs in a given year. On August 18, 2006, the
24 Board found that these regulations no longer substantially interfered with RCW 36.70A. 020
25 (2) and (8) and rescinded invalidity. Order Lifting Invalidity.
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28 On July 18, 2006, the County adopted Ordinance 11-2006. The County then filed a Motion
29 to Clarify and/or Modify Previous Orders of Invalidity and For Other Relief on August 9,
30 2006. On August 11, 2006, Petitioners William Sherman, Lynn Bahrych, and Stephanie
31 Johnson, filed a Memorandum in Support of San Juan County's Motion to Clarify and/or
32 Modify Previous Orders of Invalidity and For Other Relief.

1 **ISSUE PRESENTED**

2 ***Does Ordinance 11-2006 substantially interfere with the goals of the GMA or does the***
3 ***Western Washington Growth Management Hearings Board have jurisdiction over***
4 ***Ordinance 11-2006?***
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6 **DISCUSSION**

7 **Positions of the Parties**

8 San Juan County argues that the Board does not have authority over Ordinance 11-2006
9 (Rules Ordinance) because it was not adopted pursuant to RCW 36.70A.040, but was
10 adopted pursuant to RCW 19.27.095. The County declares that growth management
11 hearings boards only have jurisdiction over comprehensive plans, development regulations
12 or amendments to these GMA actions pursuant RCW 36.70A.280(1). The County explains
13 that the intent of the Rules Ordinance is to establish that a principal residence is an “allowed
14 use” on parcels that had a lawful accessory dwelling prior to November 2000. Because the
15 County did not adopt the Rules Ordinance pursuant to RCW 36.70A.040, the County argues
16 that it is not a GMA action and the Board should decline to exercise its jurisdiction.³
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20 Citing RCW 36.70A.302, the County further contends that the Rules Ordinance is not
21 subject to existing orders of invalidity because it pertains to applications for single-family
22 residences. The County states that once the County has properly defined a detached
23 accessory dwelling unit, the Board’s previous orders of invalidity have no bearing on
24 applications for single-family residences pursuant to RCW 36.70A.302(3)(b).⁴
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27 In the alternative, if the Board finds it has jurisdiction over this Rules Ordinance, then the
28 County maintains that the Rules Ordinance is compliant and that the prior order of invalidity
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32 ³ Memorandum in Support of Motions Regarding Ordinance 11-2006 at 6-7.

⁴ Ibid at 7

1 should be modified accordingly.⁵ The County supports this argument by pointing out that
2 the Rules Ordinance limits the number of applications for building permits for principal
3 residences in the following ways: (1) it limits building permits to only those applications for
4 principal residences on property which established a pre-existing ADU during the nine year
5 time frame from November 1991 to November 2000 and (2) it requires that those whose
6 applications fall within the Rules Ordinance must have continuous ownership of the subject
7 property from July 2005 to the expiration of the Rules Ordinance date, which is five years
8 after the Rules Ordinance's adoption.⁶

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11 Petitioners support the County's position that the Board does not have jurisdiction over the
12 Rules Ordinance because it was adopted pursuant to RCW 19.27.095 (the State Building
13 Code) and Ch. 36.70 RCW (the Planning Enabling Act). Petitioners assert that the Rules
14 Ordinance does not amend the comprehensive plan or development regulations, will not be
15 codified, and sunsets in five years.⁷

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18 Petitioners also contend that the Rules Ordinance was not adopted in response to an order
19 of invalidity, and therefore is afforded the presumption of validity. Petitioner emphasized
20 that no other party has objected to this ordinance, so the burden of proof that this ordinance
21 is not compliant has not been met.⁸

22 23 24 Board Discussion

25 The Board agrees with the County and Petitioners that the Board does not have jurisdiction
26 over the Rules Ordinance. There are two major reasons for this. First, the Rules Ordinance
27 establishes rules for determining when there is a vested right to build a principal residence
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31 ⁵ *Ibid* at 11.

32 ⁶ *Ibid* at 10.

⁷ Memorandum in Support of San Juan County's Motion to Clarify and/or Modify Previous Orders of Invalidity and For Other Relief at 5.

⁸ *Ibid* at 5.

1 on properties that already have a lawfully established ADU. The vesting rules themselves
2 have been adopted previously, according to the Rules Ordinance (Ordinance 11-2006,
3 Section 1); so the purpose of the Rules Ordinance is to clarify the vesting of certain
4 established rights to build principal residences. As we said in our July 21, 2005 order in this
5 case: "The responsibility and authority for determining which permits were vested previous
6 to the Board's April 6, 2001 Order does not rest with the Board."⁹ The determination of
7 whether specific rights have vested under County law is not within the Board's jurisdiction.
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10 Secondly, we find that the Rules Ordinance did not establish or change a comprehensive
11 plan policy or adopt or amend a development regulation. Therefore, because RCW
12 36.70A.280(1) only gives the Board jurisdiction over comprehensive plans, development
13 regulations or other GMA actions and amendments to them, we find that the Board lacks
14 jurisdiction over the Rules Ordinance.
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16 **CONCLUSION**

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18 The Rules Ordinance clarifies the extent to which rights vested under San Juan County
19 rules to develop principal residences where lawful ADUs were already in place. The
20 Ordinance is not a comprehensive plan or development regulation or does not amend a
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⁹ Compliance Order (July 21, 2005) at 19.

1 comprehensive plan or development regulation. For these reasons, the Board concludes it
2 has no jurisdiction over Ordinance 11-2006.

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4 Dated this 29th day of August 2006.

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6 _____
7 Holly Gadbaw, Board Member

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9 _____
10 Margery Hite, Board Member

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12 _____
13 Gayle Rothrock, Board Member

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

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

25 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
26 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
27 judicial review may be instituted by filing a petition in superior court according to the
28 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
29 Enforcement. The petition for judicial review of this Order shall be filed with the
30 appropriate court and served on the Board, the Office of the Attorney General, and all
31 parties within thirty days after service of the final order, as provided in RCW
32 34.05.542. Service on the Board may be accomplished in person 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. A petition for judicial review may not be
served on the Board by fax or by electronic mail.

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