

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 ADVOCATES FOR RESPONSIBLE  
4 DEVELOPMENT and JOHN DIEHL,

5 Petitioners,

6  
7 v.

8 MASON COUNTY,

9  
10 Respondent.

CASE NO. 06-2-0005

**ORDER FINDING  
NONCOMPLIANCE OF  
DEVELOPMENT REGULATIONS  
TO PROTECT AGAINST  
INCOMPATIBLE DEVELOPMENT**

11  
12 **I. SYNOPSIS OF DECISION**

13 THIS Matter came before the Board at a compliance hearing on development regulations to  
14 protect against inconsistent development until urban services are available. The issue at  
15 this hearing was whether the County has achieved compliance regarding Conclusion of Law  
16 J in the Final Decision and Order:

17  
18 The failure of Mason County's comprehensive plan and development regulations to  
19 ensure that public services will be available when urban levels of development are  
20 allowed in the Belfair UGA is clearly erroneous and violates RCW 36.70A.110(3), the  
21 concurrency goal (Goal 12) of the GMA (RCW 36.70A.020(12)), and the anti-sprawl goal  
(Goal 2) of the GMA.

22 In this decision, the Board finds that, although the County is working in good faith to achieve  
23 compliance, the development regulations it adopted to protect against inconsistent  
24 development within the Belfair UGA are predicated on the existence of a compliant sewer  
25 plan for the entire Belfair UGA. Since this has not yet been adopted, the development  
26 regulations do not preclude inconsistent development.  
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28  
29 **II. PROCEDURAL HISTORY**

30 This case was originally brought pursuant to a petition for review filed on February 13, 2006.  
31 In the Final Decision and Order, this Board found three areas of noncompliance:  
32

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

Conclusions of Law J, K and L.

The Final Decision and Order set a compliance deadline of February 6, 2007 on all issues.

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

On January 23, 2007, Mason County adopted Ordinance 10-07 amending Sections 1.03.030 and 1.03.031 of its Development Regulations.<sup>2</sup> Mason County offers Ordinance

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<sup>1</sup> Order Granting Extension of Compliance Period, Denying Invalidity and Setting Compliance Schedules, November 7, 2006.

<sup>2</sup> Mason County's Compliance Report and Index to Record Re: Development Regulations to Protect Against Inconsistent Development, February 12, 2007.

1 10-07 as achieving full compliance on development regulations to protect against  
2 inconsistent development.

3  
4 A compliance hearing was held on April 10, 2007 in Shelton, Washington. The Petitioners  
5 were represented by John Diehl. The County was represented by Deputy Prosecuting  
6 Attorney T.J.Martin, assisted by Planning Manager Robert Fink. All three board members  
7 attended. In response to Board questions, the County submitted Map Appendix D from the  
8 Final Supplemental Environmental Impact Statement for the Proposed Belfair Urban Growth  
9 Area Plan and Development Regulations, Mason County Comprehensive Plan policies for  
10 the Belfair Urban Growth Area and Policy U-150 E applicable to minimum dwelling units per  
11 acre in the Shelton UGA on April 16, 2007. Petitioners submitted no response to this  
12 additional information.  
13

### 14 **III. BURDEN OF PROOF**

15  
16 For purposes of board review of the comprehensive plans and development regulations  
17 adopted by local government, the GMA establishes three major precepts: a presumption of  
18 validity; a “clearly erroneous” standard of review; and a requirement of deference to the  
19 decisions of local government.  
20

21 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and  
22 amendments to them are presumed valid upon adoption:  
23

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

27 RCW 36.70A.320(1).

28 This same presumption of validity applies when a local jurisdiction takes legislative action in  
29 response to a noncompliance finding; that legislative action is presumed valid.

30 The statute further provides that the standard of review shall be whether the challenged  
31 enactments are clearly erroneous:  
32

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

RCW 36.70A.320(3)

4 In order to find the County's action clearly erroneous, the Board must be "left with the firm  
5 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,  
6 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

7  
8 Within the framework of state goals and requirements, the boards must grant deference to  
9 local governments in how they plan for growth:

10 In recognition of the broad range of discretion that may be exercised by counties and  
11 cities in how they plan for growth, consistent with the requirements and goals of this  
12 chapter, the legislature intends for the boards to grant deference to the counties and  
13 cities in how they plan for growth, consistent with the requirements and goals of this  
14 chapter. Local comprehensive plans and development regulations require counties and  
15 cities to balance priorities and options for action in full consideration of local  
16 circumstances. The legislature finds that while this chapter requires local planning to  
17 take place within a framework of state goals and requirements, the ultimate burden and  
18 responsibility for planning, harmonizing the planning goals of this chapter, and  
19 implementing a county's or city's future rests with that community.

RCW 36.70A.3201 (in part).

20 In sum, the burden is on Petitioners to overcome the presumption of validity and  
21 demonstrate that any action taken by the County is clearly erroneous in light of the goals  
22 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).  
23 Where not clearly erroneous, and thus within the framework of state goals and  
24 requirements, the planning choices of local government must be granted deference.  
25

#### 26 **IV. ISSUE PRESENTED**

27  
28 Does Mason County Ordinance 10-07 amend the County's development regulations to  
29 ensure that public services will be available when urban levels of development are  
30 allowed in the Belfair UGA as required by RCW 36.70A.110(3), the concurrency goal  
31 (Goal12) of the GMA (RCW 36.70A.020(12)), and the anti-sprawl goal (Goal 2) (RCW  
32 36.70A.020(2)) of the GMA?

1 **V. DISCUSSION**

2 **Positions of the Parties**

3  
4 Petitioners argue that the County’s amendments fail to protect against development  
5 inconsistent with GMA concurrency requirements.<sup>3</sup> This is because the development  
6 regulations, Petitioners maintain, do not achieve concurrency, that is, tying urban levels of  
7 residential development to the availability of urban levels of service.<sup>4</sup> Petitioners further  
8 urge that “ongoing construction creates new septic systems that owners will not want to  
9 abandon in favor of paying sewer utility rates” which warrants a determination of invalidity to  
10 prevent building applications from vesting to development regulations that do not ensure  
11 concurrency of urban services.<sup>5</sup>

12  
13  
14 The County responds that it has addressed the requirement that residential development  
15 within the UGA be required to connect to public sewers when they become available.<sup>6</sup> The  
16 County urges that the amendments to the development regulations remove exemptions for  
17 residential development and “tie residential development to the availability of services in the  
18 same fashion and in the same sections as was approved in the Final Order for commercial  
19 and industrial development.”<sup>7</sup>

20  
21 **Board Analysis**

22  
23 In the Final Decision and Order in this case, the Board found that residential development at  
24 urban levels within the Belfair UGA is not tied to the availability of urban levels of service  
25 (Finding of Fact 31) and that urban levels of residential development are allowed within the  
26 Belfair UGA before urban sewer service can be connected (Finding of Fact 32). Therefore,  
27 the Board concluded that the plan and development regulations failed to ensure that public  
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29  
30 <sup>3</sup> Objections to a Finding of Compliance and Request for Determination of Invalidity, Feb. 21, 2007.

31 <sup>4</sup> *Ibid.* at 1.

32 <sup>5</sup> *Ibid.* at 4.

<sup>6</sup> Respondent’s Response Re: Development Regulations to Protect from Inconsistent Development at 5.

<sup>7</sup> *Ibid.* at 5.

1 services would be available when urban levels of development are allowed in the Belfair  
2 UGA as required by RCW 36.70A.110(3), 36.70A.020(12) and 36.70A.020(2). (Conclusion  
3 of Law J).

4  
5 RCW 36.70A.110(3), read together with Goal 12 (RCW 36.70A.020(12)), requires urban  
6 levels of service in urban growth areas:

7  
8 Urban growth should be located first in areas already characterized by urban growth  
9 that have adequate existing public facility and service capacities to serve such  
10 development, second in areas already characterized by urban growth that will be  
11 served adequately by a combination of both existing public facilities and services and  
12 any additional needed public facilities and services that are provided by either public  
13 or private sources, and third in the remaining portions of the urban growth areas.  
14 Urban growth may also be located in designated new fully contained communities as  
15 defined by RCW 36.70A.350.

16 RCW 36.70A.110(3)

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

21 RCW 36.70A.020(12)

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

26 Mason County has attempted to deal with this problem by amending its Belfair and Allyn  
27 UGA development regulations to require that any project allowed to develop on septic within  
28 those UGAs is required to connect to public sewer when the sewer collection system is  
29 extended to within five hundred feet of the project site (Mason County Code §1.03.030(B)  
30 and (C)); and also requiring a binding site plan demonstrating that “the minimum density  
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1 allowed within the zone could be achieved once public sewer and/or water would be  
2 available to serve the project site.” MCC §1.03.031(A)(4). This is a very positive step.

3  
4 However, these development regulations will protect against inconsistent development only  
5 if there is a valid sewer plan for the entire UGA. That is because, until there is a sewer  
6 system for the Belfair UGA, development may continue based on septic systems. If no  
7 sewer is ultimately provided, then the Belfair UGA will not have urban levels of sewer  
8 service even though a UGA by definition allows urban levels of growth and requires urban  
9 governmental services. See RCW 36.70A.030(18).

10  
11  
12 The task of creating a non-municipal UGA, that is, a UGA that does not include a city or  
13 town, is difficult because of the necessity of providing urban governmental services where  
14 there typically were none. If urban services can be provided, a non-municipal UGA may be  
15 the best option for dealing with pre-existing areas of growth. Jefferson County has decided  
16 to pursue a UGA for the Port Hadlock/Irondale area; San Juan County is pursuing UGAs on  
17 both Lopez and Orcas Islands; and Mason County has created non-municipal UGAs in Allyn  
18 and Belfair. All of these areas have beautiful natural scenery and attract seasonal as well  
19 as year-round residents. These counties also envision these non-municipal UGAs as  
20 necessary to provide for more affordable housing and economic development opportunities.  
21 The natural attractions and county goals place significant pressures for increasing  
22 development in these areas, and the increases in development in turn require appropriate  
23 levels of sewer, water, stormwater management, and other urban services. Bringing  
24 necessary services to these areas designated for urban levels of growth is a difficult task.

25  
26  
27 Mason County is working diligently and with State support to bring public sewer to the  
28 Belfair UGA. However, it presently lacks a complete plan to provide sewer service  
29 throughout the Belfair UGA. As a result, the requirement to connect to sewer when a  
30 “sewer collection system is extended to within five hundred feet of the project site” will not  
31 preclude inconsistent development because planning for a sewer system for the area is not  
32

1 yet complete. A sewer plan that provides for the extension of sewer service throughout the  
2 UGA is necessary before a commitment to connect to public sewer is meaningful.

3  
4 Further, the binding site plan requirement will not ensure urban levels of development  
5 because those levels of development can only be achieved when public sewer and water  
6 are available. Until there is a compliant plan for providing urban governmental services  
7 throughout the Belfair UGA, MCC §§ 1.30.030 and 1.30.031 also allow development that is  
8 inconsistent with the designation of an urban growth area.  
9

10 In addition, from the post-hearing information submitted by the County, it is apparent that  
11 there are no minimum urban densities established for the Belfair UGA. As a consequence,  
12 the binding site plan requirement which shows “the minimum density allowed within the  
13 zone could be achieved once public sewer and/or water would be available to serve the  
14 project site” (MCC §1.03.031(A)(4)) does not assure urban densities will ultimately be  
15 achieved.  
16

17  
18 While we do not doubt Mason County’s good faith in pursuing its sewer plan, it does not  
19 have a compliant sewer plan for the Belfair UGA yet. Since the amendments to MCC  
20 1.30.030 and 1.30.031 are predicated upon the existence of a sewer plan for the entire  
21 Belfair UGA and do not set minimum urban densities, we cannot find they achieve  
22 compliance at this time. They are clearly erroneous and continue to violate RCW  
23 36.70A.110(3), 36.70A.020(2) and 36.70A.020(12).  
24

## 25 26 **VI. REQUEST FOR DETERMINATION OF INVALIDITY**

27 Petitioners have asked the Board to make a determination of invalidity, alleging that in “all  
28 the truly contentious matters, compliance has not been obtained until there was a  
29 determination of invalidity.”<sup>8</sup> The Board does not agree that Mason County has shown an  
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32 <sup>8</sup> Objections to Finding of Compliance and Request for Invalidity at 4.  
ORDER FINDING NONCOMPLIANCE OF DEVELOPMENT REGULATIONS  
TO PROTECT AGAINST INCOMPATIBLE DEVELOPMENT  
Case Nos. 03-2-0010, 04-2-0022  
May 14, 2007  
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1 unwillingness to comply with Board decisions. The fact that the County amended its  
2 development regulations to make the same provisions applicable to residential development  
3 as were applicable to commercial and industrial development indicates a good faith effort to  
4 comply with the Board's prior order.  
5

6 Petitioners also argue that ongoing development that is dependent on septic systems is  
7 detrimental to Puget Sound recovery efforts and the concerns of the State Department of  
8 Health.<sup>9</sup> They argue that the failure to achieve concurrency interferes with not only Goal 12,  
9 but also Goals 9 and 10, which include conserving fish habitat and protecting water  
10 quality.<sup>10</sup>  
11

12  
13 A finding of invalidity may be entered when a board makes a finding of noncompliance and  
14 further includes a "determination, supported by findings of fact and conclusions of law that  
15 the continued validity of part or parts of the plan or regulation would substantially interfere  
16 with the fulfillment of the goals of this chapter." RCW 36.70A.302(1) (in pertinent part).  
17

18 Where a local jurisdiction is making efforts to comply with Board decisions, the Western  
19 Board has looked to whether there is a reasonable risk that the continued validity of  
20 comprehensive plan provisions and/or development regulations that the Board has found  
21 noncompliant will make it difficult for the county or city to engage in proper planning. See  
22 *Vinatieri v. Lewis County*, WWGMHB Case No. 03-2-0020c and *Irondale Community Action*  
23 *Neighbors v. Jefferson County*, WWGMHB Case No. 04-2-0011, as examples.  
24  
25

26 Under the circumstances presented here, such a determination requires the Board to find  
27 that the threat of significant inconsistent development makes a remand with an order to  
28 achieve compliance insufficient to enable the County to pursue proper planning under the  
29 Act. We do not find that such a threat has been shown here, especially where the time for  
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31 \_\_\_\_\_  
32 <sup>9</sup> *Ibid* at 2.

<sup>10</sup> *Ibid*.

1 ultimate compliance of the capital facilities plan is only a few months away, However, if  
2 circumstances change such that development applications during the pendency of the  
3 County's compliance efforts are likely to vest in ways that will substantially interfere with the  
4 achievement of the goals and requirements of the GMA, we will entertain a motion to  
5 impose invalidity on provisions that we have found noncompliant in this compliance order  
6 and/or the final decision and order. RCW 36.70A.330(4). Such a motion may be brought at  
7 any time until compliance has been found but must be accompanied by documents  
8 indicating the conditions justifying a finding of invalidity.  
9

## 10 **VII. FINDINGS OF FACT**

- 11 1. Mason County is a county located west of the crest of the Cascade Mountains that is  
12 required or chosen to plan pursuant to RCW 36.70A.040.
- 13 2. Petitioners were the original parties to the Petition for Review filed in this case.
- 14 3. In the Final Decision and Order issued in this case on February 13, 2006, the Board  
15 found that residential development at urban levels within the Belfair UGA is not tied to  
16 the availability of urban levels of service (Finding of Fact 31) and that urban levels of  
17 residential development are allowed within the Belfair UGA before urban sewer  
18 service can be connected (Finding of Fact 32).
- 19 4. The Board further concluded:  
20       The failure of Mason County's comprehensive plan and development  
21       regulations to ensure that public services will be available when urban levels  
22       of development are allowed in the Belfair UGA is clearly erroneous and  
23       violates RCW 36.70A.110(3), the concurrency goal (Goal 12 of the GMA  
24       (RCW 36.70A.020(12)), and the anti-sprawl goal (Goal 2) of the GMA.  
25       Conclusion of Law J, Final Decision and Order (February 13, 2006).
- 26 5. Mason County amended its development regulations applicable in the Allyn and  
27 Belfair urban growth areas (UGAs) on January 23, 2007 by adopting Ordinance 10-  
28 07.
- 29 6. The amendments to Mason County Code §1.03.030(B) and (C) require that any  
30 project allowed to develop on septic within the Allyn and Belfair UGAs must connect  
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1 to public sewer when the sewer collection system is extended to within five hundred  
2 feet of the project site.

- 3 7. MCC §1.03.031(A)(4) requires a binding site plan demonstrating that “the minimum  
4 density allowed within the zone could be achieved once public sewer and/or water  
5 would be available to serve the project site.”  
6  
7 8. These amendments to the development regulations will protect against inconsistent  
8 development only if there is a valid sewer plan for the entire UGA.  
9  
10 9. There is not yet a compliant sewer plan for the Belfair UGA.  
11  
12 10. There are no minimum urban residential densities established for the Belfair UGA.  
13  
14 11. Petitioners have failed to show that there is a significant risk that incompatible  
15 development that will interfere with proper planning for the Belfair UGA will occur  
16 during the period in which the County is working on its capital facilities plan for the  
17 Belfair UGA.  
18  
19 12. Any Finding of Fact which is hereafter determined to be a Conclusion of Law is  
20 hereby adopted as such.

### 21 VIII. CONCLUSIONS OF LAW

- 22 A. The Board has jurisdiction over the parties and subject matter of this case.  
23 B. Petitioners have standing to participate in this compliance action.  
24 C. The amendments to Mason County Code §§ 1.30.030 and 1.30.031 adopted in  
25 Mason County Ordinance 10-07 fail to ensure that public services will be available  
26 when urban levels of development are allowed in the Belfair UGA, are clearly  
27 erroneous and violate RCW 36.70A.110(3), the concurrency goal (Goal (12) of the  
28 GMA (RCW 36.70A.020(12)), and the anti-sprawl goal (2).  
29 D. The Board does not find a basis for a determination of invalidity as to Mason County  
30 Ordinance 10-07 at this time.  
31 E. Any Conclusion of Law hereafter determined to be a Finding of Fact is hereby  
32 adopted as such.

1 **IX. ORDER**

2 The County is hereby ordered to achieve compliance in accordance with this decision on  
3 the same schedule that is presently applicable to the County's other compliance efforts in  
4 this case. That schedule is as follows:

5

6 Compliance Due	August 6, 2007
7 Compliance Report and Index to the 8 Record (County to file and serve on all 9 parties)	August 13, 2007
10 Any Objections to a Finding of 11 Compliance Due and Any Motions to 12 Supplement and/or Impose Invalidity Due	September 4, 2007
13 County's Response to Objections and Any 14 Motions by Petitioners Due	September 25, 2007
15 Compliance Hearing (location to be 16 determined)	October 3, 2007

17 So Ordered this 14<sup>th</sup> day of May 2007.

18 \_\_\_\_\_  
Margery Hite, Board Member

19 \_\_\_\_\_  
Holly Gadbaw, Board Member

20 \_\_\_\_\_  
James McNamara, Board Member

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

22 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the  
23 mailing of this Order to file a petition for reconsideration. Petitions for  
24 reconsideration shall follow the format set out in WAC 242-02-832. The original and  
25 three copies of the petition for reconsideration, together with any argument in  
26 support thereof, should be filed by mailing, faxing or delivering the document directly  
27 to the Board, with a copy to all other parties of record and their representatives.  
28  
29  
30  
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32

1 **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6),  
2 **WAC 242-02-330.** The filing of a petition for reconsideration is not a prerequisite for  
3 filing a petition for judicial review.

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

8 **Enforcement.** The petition for judicial review of this Order shall be filed with the  
9 appropriate court and served on the Board, the Office of the Attorney General, and all  
10 parties within thirty days after service of the final order, as provided in RCW  
11 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,  
12 but service on the Board means **actual receipt of the document at the Board office**  
within thirty days after service of the final order.

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