

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 BRINNON GROUP and BRINNON MPR
3 OPPOSITION,

4
5 Petitioners,

6 v.

7 JEFFERSON COUNTY,

8
9 Respondent,

10 And

11 Pleasant Harbor,

12
13 Intervenor.
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Case No. 08-2-0014

ORDER ON PETITIONERS' MOTION FOR RECONSIDERATION

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16 THIS Matter comes before the Board upon Petitioner's Motion for Reconsideration of the
17 Board's September 15, 2008 Final Decision and Order.¹ Jefferson County opposes the
18 Motion.² Intervenors have also filed a response to the Motion.³
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21 **PRELIMINARY MATTERS**

22 The County has filed a Motion for leave to file a late response in opposition to the Motion.⁴
23 With regard to the filing of a response to motions for reconsideration, WAC 242-02-832(1)
24 provides:

25 (1) After issuance of a final decision any party may file a motion for reconsideration
26 with a board in accordance with subsection (2) of this section. Such motion must be
27 filed within ten days of service of the final decision. The original and three copies of
28 the motion for reconsideration shall be filed with the board. At the same time,
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30 ¹Petitioners' Motion for Reconsideration, filed September 25, 2008.

31 ² On October 3, 2008 Jefferson County filed a Motion for Leave to File a Late Response Additional in
Opposition to Petitioners' Motion for Reconsideration.

32 ³ Intervenor's Response to Petitioner's Motion for Reconsideration, filed October 6, 2008.

⁴ Motion per WAC 242-02-530 and 02-532 of Jefferson County to File a Late Response, filed October 3, 2008.

1 copies shall be served on all parties of record. Within five days of filing the
2 motion for reconsideration, a party may file an answer to the motion for
3 reconsideration without direction or request from the board. A board may require
4 other parties to supply an answer. All answers to motions for reconsideration
5 shall be served on all parties of record.

6 Petitioners filed their Motion for Reconsideration within ten days of the Board's issuance of
7 the Final Decision and Order (FDO) in this case. The County filed its response on October
8 3, 2008. In his declaration in support of the County's Motion, the County's attorney
9 mistakenly admits that its Motion was filed either two or three days late.⁵ In fact, however,
10 WAC 242-02-060 provides that when the time prescribed or allowed is less than seven
11 days, intermediate Saturdays and Sundays shall be excluded from the computation. Here,
12 Petitioners' Motion was filed on Thursday, September 25. Therefore, excluding the
13 intervening weekend from the calculation, the County's response was due on October 2. It
14 was filed on the 3rd – one day late.

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17 In support of its Motion for leave to file a late response, the County argues that briefs in
18 opposition would be of assistance to the Board as it decides the Motion for Reconsideration
19 because all sides would then have the chance to comment on the substance of the Motion.⁶
20 It further argues that there would be no prejudice to the Petitioners as there is no provision
21 allowing a reply to a brief in opposition to a motion to reconsider, and thus a late brief from
22 the County would have no impact on the Petitioners' response time.⁷
23

24 The Board notes that Petitioners have not objected to the County's Motion and further
25 agrees with the County that granting the Motion to allow a late response would be of
26 assistance to the Board⁸. The Board and the parties benefit from a full briefing of the issues
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31 ⁵ Declaration of David Alvarez in Support of Motion by Jefferson County for Leave to File a Late Response in
32 Opposition to Petitioners' Motion for Reconsideration, at 2.

⁶ Id.

⁷ Id.

⁸ Id. at 2.

1 and consideration of the arguments in favor and in opposition. Accordingly, the County's
2 Motion will be granted and its response brief considered.

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4 The Intervenor in this case has also filed a response to Petitioners' Motion for
5 Reconsideration.⁹ Like the County's response, it too was filed late. Intervenor, through its
6 attorney John Cooke, submitted a declaration in which Mr. Cooke notes that he did not
7 receive Petitioner's Motion until September 30, 2008, and thus could not provide a response
8 within of days of filing."¹⁰ (*sic*) In fact, the Intervenor, like the County, had until October 2,
9 2008 to file its response. While this very limited response window would make it difficult to
10 prepare a detailed response, it is not the case that Intervenor could not respond at all within
11 the allowed time frame, as Intervenor apparently suggests. Contained within a footnote in
12 its response is a request that the Board consider its Motion.¹¹ Given that no objection was
13 filed to this late response, the Board will treat this as a Motion for Leave to File a Late
14 Response, and agree to consider it.
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17 **DISCUSSION AND ANALYSIS**

18 A motion for reconsideration of a final decision of a Board is governed by WAC 242-02-832.
19 WAC 242-02-832(2) provides that a motion for reconsideration must be based on at least
20 one of the following grounds:
21

- 22 (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking
23 reconsideration;
- 24 (b) Irregularity in the hearing before the board by which such party was prevented from
25 having a fair hearing; or
- 26 (c) Clerical mistakes in the final decision and order.

27 The Board notes that although Petitioners assert that their Motion is based on the criteria in
28 WAC 242-02-832 (a) and (c)¹² the Motion points to no clerical mistakes.
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31 ⁹ Intervenor's Response to Petitioner's Motion for Reconsideration.

32 ¹⁰ Declaration of John T. Cooke, at 2.

¹¹ Intervenor's Response to Petitioner's Motion for Reconsideration, at 2, fn 1.

¹² Petitioners' Motion for Reconsideration, at 1.

1 New Arguments

2 Petitioners request that the Board reconsider its decision of that portion of Issue #3 that
3 challenges compliance with the “the procedural requirements for an alternative in the EIS
4 other than the no action alternative with less impact than the proposal”.¹³ Petitioners base
5 their request on a new argument.¹⁴
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7 Before addressing Petitioners’ arguments, the Board must address Petitioners’ premise that
8 a Motion for Reconsideration is an opportunity to present new argument.¹⁵ While it is true
9 that the Board has previously held that Motions for Reconsideration will be denied when
10 they present no new arguments that were not previously considered in the original
11 decision,¹⁶ this is not to say that the opposite is true, i.e. that a Motion for Reconsideration
12 is an opportunity to present new arguments that could have been presented at the Hearing
13 on the Merits (HOM), but were not.
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16 In *CCNRC v. Clark County*, WWGMHB No. 96-2-0017, RO (1/21/98), the Board noted, “We
17 have examined the motions for reconsideration. We find that they present no new
18 arguments that were not considered by us in the original decision. The motions for
19 reconsideration are denied.” Likewise, in *Anacortes v. Skagit County*, WWGMHB No. 00-2-
20 0049c, RO (March 5, 2001), which the Petitioners rely upon, the Board noted, “We find no
21 new arguments were presented by either of the requests for reconsideration. Both motions
22 for reconsideration in this case are denied.” The Board did not elaborate, and certainly did
23 not indicate that new arguments not presented at the Hearing on the Merits (HOM) would
24 have been entertained. Instead, it is consistent with the applicable law, and therefore more
25 reasonable, to interpret these orders as an indication that a motion for reconsideration that
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31 ¹³ Id. at 2.

32 ¹⁴ Id.

¹⁵ Id..

¹⁶ *CCNRC v. Clark County*, WWGMHB No. 96-2-0017 (RO 1/21/98).

1 merely recites arguments previously rejected in the Final Decision and Order will not
2 support a motion for reconsideration.

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4 In the other case relied upon by Petitioners, *PPF v. Clallam County*, WWGMHB No. 00-2-
5 0008, RO (December 13, 2001) the Board noted that it could characterize the petitioners'
6 argument as "new" because "it is much more precise and thorough than the one presented
7 in their opening brief for the hearing on the merits." However, the Board did not cite,
8 discuss or otherwise explain why it felt it was appropriate to consider an argument that had
9 been made and rejected at the HOM, albeit in a less "precise and thorough" manner.
10

11 This statement contrasts to what the Board held in *Williams v. Whatcom (Williams)*,
12 WWGMHB No. 94-2-0013, RO (9/11/94), where this Board held that we "will not allow the
13 County or any other party to submit previously available evidence for the first time on a
14 motion for reconsideration."
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17 *Williams* is more in line with the situation here. The evidence that Petitioners cite was in
18 the Record and they could have presented it to the Board in their opening brief. However,
19 they did not choose to do so. Instead presented a four-line argument¹⁷ and left it to the
20 Board to find the evidence in the Record. The Board agrees with Jefferson County and the
21 Intervenor's implication that allowing the Petitioners to present new argument in a Motion for
22 Reconsideration *de facto* extends the filing deadline for a party's opening brief.¹⁸
23

24 Further, not only will the Board not consider new arguments that should have been
25 presented in a party's opening brief or at the Hearing on the Merits (HOM), it will reject a
26 Motion for Reconsideration that merely relies on previously rejected argument. The HOM is
27 the time for the parties to present their case and to allow Board questioning of the legal
28 theories and the record on which the parties relied. Raising new arguments, or even
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31 ¹⁷ Petitioners' Opening Brief at 23 and 24.

32 ¹⁸ Brief of Respondent Jefferson County Opposing Motion for Reconsideration at 3 and 4. Intervenor's
Response to Petitioner's Motion for Reconsideration at 4 and 5.

1 making a more precise argument, in a motion for reconsideration should not be allowed
2 and is not provided for in WAC 242-02-832(2). Allowing new or restructured arguments
3 would be wasteful of the parties' and the Board's limited time and resources. Instead, the
4 parties should endeavor to make their most thorough and precise arguments in their hearing
5 briefs and at the HOM. A Motion for Reconsideration then provides the opportunity to
6 determine whether the Board committed one of the errors enumerated in WAC 242-02-
7 832(2). The discussion of "new argument" in prior Board decisions must be understood in
8 this context.
9

10
11 **Conclusion:** As noted above, Petitioners' Motion is based on the incorrect premise that "A
12 motion for reconsideration is an opportunity to present new argument".¹⁹ We find this to be
13 a false premise and that a Motion for Reconsideration must be based on the grounds
14 provided for in WAC 242-02-832(2) such as an error of procedure or misinterpretation of fact
15 or law. Further, the Board finds that allowing new arguments in a motion for reconsideration
16 is detrimental to the concepts of the finality of decisions and judicial economy. Therefore,
17 the Board will not reconsider its conclusion regarding that portion of Issue 3 as stated in
18 Conclusion of Law S.²⁰
19

20
21 Request to Reconsider Decision Finding the Brinnon Subarea Map was consistent with the
22 Master Planned Resort Designation (MPR)

23 Petitioners request reconsideration of the finding that the MPR map and the Brinnon
24 Subarea Plan map are consistent, do not violate RCW 36.70A.070 and argue that the urban
25 development on the MPR map is not consistent with rural development depicted on the
26 Brinnon Subarea Map. Petitioners contend that the comprehensive plan cannot be changed
27 by zoning and must be done through a comprehensive plan amendment.²¹ The County
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31 ¹⁹ Petitioners' Motion for Reconsideration at 1.

32 ²⁰ Final Decision and Order at 42.

²¹ Petitioners Motion for Reconsideration at 8 and 9.
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1 points out that the MPR is conceptual and will not become a reality until completion of Steps
2 2 through 5 as outlined in Exhibit 16-83.²²

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4 Figure BR-11 depicting the Black Point – Conceptual Master Planned Resort states: “Only
5 through the approval of an MPR application would this or any other MPR boundary amend
6 the Land Use Map.²³ JCC 18.15.135 requires that applications can only be approved if
7 master plans for MPRs meet certain criteria. The second phase, as referenced in the Final
8 Decision and Order,²⁴ and as outlined in Exhibit 16-83, references zoning changes
9 (development regulations) and developer agreements, which is the phase where a master
10 plan would be approved.
11

12 **Conclusion:** Therefore, based on our review of the FDO, the arguments of the parties, and
13 the record, the Board does not find it erred in finding that the MPR map and the Brinnon
14 Subarea Map complied with RCW 36.70A.070. Petitioners’ request to reconsider findings
15 and conclusions related to this inconsistency is denied.
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18 Request to Reconsider the Board’s Conclusion that the County’s action complied with RCW
19 36.70.400.

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21 Our review of the arguments does not cause us to conclude that we erred in finding that,
22 although the County had not fulfilled the exact requirements of RCW 36.70.400, which is
23 part of the County’s public participation process, in light of the entire record Jefferson
24 County complied with the GMA’s public participation requirements.²⁵
25

26 ORDER

27 Having reviewed Petitioners’ Motion for Reconsideration, the County and Intervenor’s
28 Responses, the relevant provisions of the GMA and the Board’s Rules of Practice and
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30 ²² Brief of Respondent Jefferson County at 5.

31 ²³ Exhibit BR-3.

²⁴ Final Decision and Order at 21.

32 ²⁵ Final Decision and Order at 17 and 18.

1 Procedure, in particular WAC 242-02-832(2), the Board finds that Petitioners have failed to
2 provide a basis that compels reconsideration of the Final Decision and Order. **Therefore,**
3 **for the reasons set forth above, Petitioners' Motion for Reconsideration is hereby**
4 **DENIED.**

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6 SO ORDERED this 14th day of October, 2008.
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James McNamara

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11 _____
William Roehl

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Holly Gadbow
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