

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 Stephen F. Ludwig, et al,
3
4 Petitioners,
5 v.
6 San Juan County,
7
8 Respondent,

**CASE NO. 05-2-0019c
COMPLIANCE ORDER -
EASTSOUND UGA**

9 Fred R. Klein,
10
11 Petitioner,
12 v.
13 San Juan County,
14
15 Respondent.

**CASE NO. 02-2-0008
COMPLIANCE ORDER -
EASTSOUND UGA**

16 John M. Campbell, et al,
17
18 Petitioner,
19 v.
20 San Juan County,
21
22 Respondent.

**CASE NO. 05-2-0022c
COMPLIANCE ORDER -
EASTSOUND UGA**

23
24
25 **I. SYNOPSIS OF THE DECISION**

26 San Juan County has struggled to establish an Eastsound Urban Growth Area (UGA) for
27 almost a decade. The effort has proceeded with fits and starts due largely to turnover in
28 staff until just recently. This endeavor also illustrates the difficulty that rural counties have in
29 designating a UGA due to the expense of providing urban services and the reliance on
30

1 outside service providers such as special districts that are not required to plan according to
2 the Growth Management Act (GMA) or subject to the Board's jurisdiction.

3
4 The issues before the Board in this compliance hearing are set forth in our June 20, 2006
5 Final Decision and Order/Compliance Order. These issues include the adequacy and lack
6 of incorporation of sewer and storm drainage plans in the County's Comprehensive Plan,
7 presence of less than urban densities in the UGA, and failure of the Eastsound Sewer
8 District's (District) Plan to serve the entire UGA for the 20-year planning period.
9

10 This order finds that the areas designated with less than urban densities have
11 environmental constraints and will be served by sewer. For that reason including them in
12 the UGA complies with the GMA.
13

14 The County has incorporated its storm drainage plan and the District's sewer plan into its
15 Comprehensive Plan to fulfill the GMA's planning requirements for a capital facilities
16 element. These plans also demonstrate that these facilities can be extended throughout the
17 UGA and financed over the Comprehensive Plan's 20-year planning period. The final
18 stumbling block for the County is the District's Plan, now part of the County's
19 Comprehensive Plan, that shows sewer lines extending far from the UGA's boundaries. This
20 is not consistent with the Comprehensive Plan's Land Use Element or the UGA boundaries
21 and does not comply with RCW 36.70A.110(4), RCW 36.70A.070, and RCW 36.70A.020(2).
22
23

24 A major issue of contention for Petitioners Klein and Campbell is that the County's land
25 capacity analysis does not demonstrate that there is enough residential land supply
26 because areas in the UGA zoned Village Residential (VR) are occupied by institutional and
27 commercial uses. Here, the County used a market factor and seasonal home factor to add
28 more land than it actually needed to account for land that might be developed over the
29 planning period and homes used by seasonal residents. Petitioners object to the County
30 using these factors to account for institutional land that might occupy VR zoned land. The
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32

1 Board finds that using the market factor for this purpose is not clearly erroneous. Although
2 institutional and commercial uses will most likely occupy VR-zoned land in the future, the
3 market and seasonal home factors provide that the Eastsound UGA has sufficient capacity
4 to provide for its future residential, commercial, and institutional uses.
5

6 II. RECENT PROCEDURAL HISTORY¹

7 On June 20, 2006 the Board issued the Final Decision and Order/Compliance Order
8 (Eastsound UGA) in WWGMHB Cases 05-2-0019c, 02-2-0008, and 05-2-0022. These
9 cases are being heard together. That Order found that San Juan County's designation of
10 the 2005 Eastsound UGA was not compliant for the following reasons: (1) failure to
11 incorporate financing plans for sewer and storm drainage facilities in the County's six-year
12 capital facilities plan, (2) "failure to show its work" for commercial and institutional uses and
13 adequately analyze the need for commercial and institutional land, (3) zoning areas within
14 the UGA at less than urban densities without showing the local circumstances that warrant
15 these lower densities, and (4) failure of the capital facilities element to show that urban
16 levels of service are planned within the entire UGA in the 20-year planning period. That
17 Order also found that the County's designation of the Eastsound UGA was noncompliant
18 because it did not have a capital facilities plan that showed that sewer service could be
19 delivered to all parts of the UGA in violation of RCW 36.70A.110(3) and (4) and RCW
20 36.70A.020(2). That Order established December 18, 2006 as the compliance deadline.²
21
22
23

24 The Board issued Orders extending the compliance deadline for 180 days on January 19,
25 2007, June 19, 2007, January 18, 2008, and June 6, 2008. The June 19, 2007 order
26 required San Juan County to engage in mediation with the Eastsound Sewer District. The
27 June 6, 2008 order that granted an extension also denied Petitioner Austin's Motion for
28 Invalidation.
29

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31 ¹ For a more complete procedural history see Final Decision and Order/Compliance Order (June 20, 2006) at
Appendix A.

32 ² Final Decision and Order/Compliance Order (June 20, 2006) at 35.

1 On September 11, 2008, San Juan County filed its compliance report. Petitioners Klein,
2 Campbell, and Austin all filed timely responses.
3

4
5 Petitioner Klein filed a motion to add to the index on September 22, 2008 to which the
6 County responded on October 6, 2008. Petitioner Klein filed a motion to disregard the
7 County's Response on October 10, 2008, and the County responded on October 23, 2008.
8 This Order denies those motions.
9

10 On October 21, 2008, the County filed its Response to Objections to a Finding of
11 Noncompliance.
12

13 A Compliance Hearing was held on October 30, 2008 at the Fire Station on Orcas Island.
14 All three Board Members attended. Holly Gadbow presided. Petitioners Fred Klein, John
15 Campbell, and Dorothy Austin represented themselves. Jonathan Cain represented San
16 Juan County.
17

18 At the hearing the Board asked the County to submit supplemental information, which it did
19 on November 20, 2008. Petitioners Klein and Campbell asked permission to respond,
20 which the Presiding Officer granted. On December 1, 2008, Fred Klein filed an Objection to
21 San Juan County's Supplemental Authorities.
22

23 24 **III. PRELIMINARY MATTERS**

25 A. Motion to Supplement the Record and Motion to Disregard County's Response Brief

26 **Positions of the Parties**

27 On September 22, 2008, the Board received Petitioner Klein's Motion to Supplement the
28 Record and Memorandum in Support There Of with the following items:
29

- 30 • Proposed Index Numbers 000901, 902 – San Juan County Auditor File No.
31 2005 1014006, Pages 1 and 2,
32

- Proposed Index Numbers 000903, 000904, 000905 – San Juan County Auditor File No. (1980) 11718, Vol.2. Pages 76, 76A, 76B,
- Proposed Index Numbers 000906 and 907 – San Juan County Auditor File 94052739, Volume 6, Pages 71, 71A,
- Proposed Index Number 000908 – San Juan County Auditor File No. 2005 10140007, Pages 5 -7, and
- Proposed Index Numbers 000909 and 000910 – San Juan County Auditor File 2007 1107023, Volume 7, Pages 101, 101A.

Petitioner says these items would substantially assist the Board in evaluating the County's land capacity analysis and show that the County does not have sufficient land available to meet the anticipated commercial, institutional, and residential growth through 2020.³

San Juan County's Response to Motion to Supplement the Record was filed on October 6, 2008. The County says the documents submitted by Petitioner were not submitted to the County as part of its compliance efforts. The County argues that because these documents describe restrictions that can be modified or overcome, they will not substantially assist the Board.⁴

On October 10, 2008, Petitioner Klein submitted Motion to Disregard San Juan County's Response Opposing Motion to Supplement the Index to the Record. Petitioner says that the County made no objection to his motion to supplement the index until after he had submitted his brief and the County had assessed the strength of his argument. Petitioner further notes that the County's response to his motion to supplement was made after the ten-day deadline to respond to motions. For these reasons, Petitioner asks the Board not to accept the County's motion.⁵

³ Motion to Supplement the Index to the Record and Memorandum in Support There Of at 2 and 3.

⁴ San Juan County's Response to Motion to Supplement the Record at 2.

⁵ Motion to Disregard San Juan County's Response Opposing Motion to Supplement the Index to the Record at 2 and 3.

1 San Juan County's Response to Motion to Disregard was submitted on October 23, 2008.
2 The County argues that its motion was timely because according to WAC 242-02-534 the
3 appropriate date to calculate when the response is due is from the date the County received
4 the motion, which was September 23, 2008. The County further informs the Board that the
5 attachments to the subject motion were not received until September 26, 2008. The County
6 notes it filed its response ten days after it received the motion and the attachments.⁶
7

8 The County contends the Board established the deadline for filing Petitioners' brief in its
9 June 6, 2008 Order Granting an Extension and Denying Motion for Invalidity. The County
10 says the timing of Petitioner's motion to supplement was determined by him, and even if the
11 date of filing was considered complete on September 23, 2008, the County could not have
12 responded by the time Petitioner's brief was due.⁷
13

14 **Board Discussion**

15 The following Board rules of procedure are pertinent to this discussion:

16 WAC 242-02-540:

17 Generally, a board will review only the record developed by the city, county, or state
18 in taking the action that is the subject of review by the board. A party by motion may
19 request that a board allow such additional evidence as would be necessary or of
20 substantial assistance to the board in reaching its decision, and shall state its
21 reasons. A board may order, at any time, that new or supplemental evidence be
22 provided.

23 WAC 242-02-534 (1):

24 A party served with a motion shall have ten days from the date of receipt of the
25 motion to respond to it, unless otherwise directed by the presiding officer. A response
26 to the motion shall be filed with a board and a copy served on the opposing
27 party/parties.

28 The County maintains it did not receive the motion until September 23, 2008, and did not
29 receive the documents which Petitioner seeks to add to the index until September 26, 2008.
30

31 ⁶ San Juan County's Response to Motion to Disregard at 2 and 3.

32 ⁷ Id. at 3.

1 The Board received Petitioner's motion to supplement on September 22, 2008 by e-mail
2 and a hard copy of the motion and attachments postmarked September 22, 2008. That is
3 the date from which the deadline for responses is calculated.
4

5 At argument, Petitioner did not dispute supporting documents were not mailed to the County
6 with the motion. The Board finds that without the supporting documents it would be difficult
7 for the County to evaluate them and prepare a response. In this situation, the deadline for a
8 response should be calculated from the time the County received the supporting
9 documents. Because the County received the supporting documents on September 26,
10 2008, the County's response was filed on October 6, 2008, ten days from the date the
11 supporting documents were received by the County. Therefore, the County's response was
12 not untimely pursuant to WAC 242-02-534.
13
14

15 At argument, Petitioner Klein did not disagree with the County's assertion that he had not
16 submitted the auditor's records to the County that questioned the County's interpretation of
17 data as part of the compliance process. Generally, the Board will only review evidence that
18 was part of the County's record. Petitioner does not state why he could not have submitted
19 this evidence to the County as it was available at the time the County was making its
20 decision. While the data was available to the County, Petitioner should have presented the
21 data and argument to the County during the compliance process so that the County could
22 respond to it.
23
24

25 **Conclusion:** Based on the foregoing, Petitioner Klein's Motion to Disregard San Juan
26 County's Response Opposing Motion to Supplement the Index to the Record is DENIED.
27 Petitioner Klein's Motion to Supplement the Record and Memorandum in Support There Of
28 is DENIED.
29

30 B. Post Hearing Submittals
31

1 On November 20, 2008, the County submitted San Juan County's Supplemental Authorities
2 (Eastsound UGA) in response to the Board's request at the hearing on the merits. These
3 included the following attachments: a 1977 Franchise Agreement between San Juan
4 County and the District, excerpts from the Districts National Pollutant Discharge Permit,
5 various excerpts from the County Code, a November 4, 2008 Letter to the District from
6 Deputy Prosecutor Jonathan Cain, a November 12, 2008 Letter to Jonathan Cain from the
7 District with attached list of sewer connections made between 2005-2008, and a map
8 entitled Residential Land Use in Eastsound.
9

10
11 Petitioners Klein and Campbell asked for permission to respond to the County's submittal,
12 which was granted by the Presiding Officer.
13

14 Petitioner Klein submitted Motion Objecting to San Juan County's Supplemental Authorities.
15 With his submittal, Petitioner Klein attached the November 4, 2008 letter from Jonathan
16 Cain to the District, a November 17, 2008 letter from Randall Gaylord to the District,
17 Petitioner's Exhibit E - an annotated version of the map entitled Residential Land Use In
18 Eastsound showing commercial uses in the Village Residential Zone and various assessor's
19 records.
20

21 As for the assessor's records, there is no indication in the Index to the Record that these
22 were submitted to the County during the compliance proceedings, so the Board will not
23 consider them.
24

25 Petitioner Campbell submitted Motion to Amend Respondent's Supplemental Authorities.
26 He attached an enlarged map of the Village Commercial and Village Residential Zones
27 showing the commercial uses occupying the Village Residential Zone, various assessor's
28 records, a October 12, 2007 letter to Peter Fisher, Chair of EPRC, November 25, 2008 e-
29 mail from Colin Maycock to Fred Klein, and various sections the San Juan County Code
30 regarding the Village Residential District.
31
32

1 As with the other assessor's records submitted by Petitioner Klein, as there is no indication
2 in the index that they were submitted to the County they will not be considered by the
3 Board.

4 5 **IV. BURDEN OF PROOF**

6 After a board has entered a finding of non-compliance, the local jurisdiction is given a period
7 of time to adopt a legislative enactment to achieve compliance. RCW 36.70A.300(3)(b).

8 After the period for compliance has expired, the board is required to hold a hearing to
9 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and
10 (2).
11

12 For purposes of board review of the comprehensive plans and development regulations
13 adopted by local governments in response to a non-compliance finding, the presumption of
14 validity applies and the burden is on the challenger to establish that the new adoption is
15 clearly erroneous. RCW 36.70A.320(1),(2) and (3). If a finding of invalidity has been
16 entered, the burden is on the local jurisdiction to demonstrate that the ordinance or
17 resolution it has enacted in response to the finding of invalidity no longer substantially
18 interferes with the goals of the GMA. RCW 36.70A.320(4).
19
20

21 In order to find the City's action clearly erroneous, the Board must be "left with the firm
22 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
23 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
24

25 Within the framework of state goals and requirements, the boards must grant deference to
26 local governments in how they plan for growth:
27

28 In recognition of the broad range of discretion that may be exercised by counties and
29 cities in how they plan for growth, consistent with the requirements and goals of this
30 chapter, the legislature intends for the boards to grant deference to the counties and
31 cities in how they plan for growth, consistent with the requirements and goals of this
32 chapter. Local comprehensive plans and development regulations require counties

1 and cities to balance priorities and options for action in full consideration of local
2 circumstances. The legislature finds that while this chapter requires local planning to
3 take place within a framework of state goals and requirements, the ultimate burden
4 and responsibility for planning, harmonizing the planning goals of this chapter, and
5 implementing a county's or city's future rests with that community.
RCW 36.70A.3201 (in part).

6 In sum, the burden is on the Petitioner to overcome the presumption of validity and
7 demonstrate that any action taken by the County is clearly erroneous in light of the goals
8 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
9 Where not clearly erroneous and thus within the framework of state goals and requirements,
10 the planning choices of the local government must be granted deference.
11

12 V. ISSUES TO BE DISCUSSED

13 These issue statements are based on the issues on which the Board found the County
14 noncompliant in the June 20, 2006 Final Decision and Order/Compliance Order:
15

16 **Issue One:** Does the County's capital facilities element incorporate a capital facilities plan
17 for sewer service in the Eastsound UGA in order to comply with RCW 36.70A.070(3)?⁸

18 **Issue Two:** Does the County's capital facilities element include a six-year financing plan
19 for its storm drainage facilities for the Eastsound UGA in order to comply with RCW
20 36.70A.070 (3)(a) – (d) and RCW 36.70A.020(12)?⁹

21 **Issue Three:** Has the County's "shown its work" for the Eastsound UGA's commercial and
22 institutional needs and adequately analyzed the needed land for commercial and
23 institutional uses in order to comply with RCW 36.70A.110(2) and RCW 36.70A.115?¹⁰

24 **Issue Four:** Has the County provided evidence to show that the areas within the UGA
25 zoned for less than urban densities is based on the local circumstances that warrant such
26 lower densities in order to comply with RCW 36.70A.020(1), (2) and RCW 36.70A.110(1)?¹¹

27 **Issue Five:** Does the capital facilities element for the Eastsound UGA demonstrate that
28
29

30 ⁸ Final Decision and Order/Compliance Order (June 20, 2006) at Conclusion of Law A at 34.

31 ⁹ Id. at Conclusion of Law B.

32 ¹⁰ Id. at Conclusion of Law C.

¹¹ Id. at Conclusion of Law E.

1 urban levels of service are planned for the entire UGA during the 20-year planning period in
2 order for the boundaries of the Eastsound UGA to comply with RCW 36.70A.110(3) and
3 RCW 36.70A.020(12)?¹²

4 **Issue 6:** Does the capital facilities plan fail to provide urban levels of service to all areas of
5 the UGA during the 20-year planning period and are the boundaries of the UGA compliant
6 with RCW 36.70A.110(3) and (4) and RCW 36.70A.020(12)?¹³

7 Petitioners raise the following issues:

8 **Issue 7:** Does the Eastsound UGA provide for affordable housing?¹⁴

9
10 **Issue 8:** Does the Eastsound UGA provide for enough industrial land?¹⁵

11 **Issue 9:** Does the Eastsound UGA's capital facilities plan provide for adequate water
12 service to the UGA?¹⁶

13 14 VI. DISCUSSION OF THE ISSUES

15 A. Sewer Capital Facilities Plan

16 1. Compliance with RCW 36.70A.070 (3)(d)

17 Issue One: Does the County's capital facilities element incorporate a capital facilities plan
18 for sewer in the Eastsound UGA into its comprehensive plan in order to comply with RCW
19 36.70A.070(3)?¹⁷

20 Issue Five: Does the capital facilities element for the Eastsound UGA demonstrate that
21 urban levels of service are planned for the entire UGA during the 20-year planning period in
22 order for the boundaries of the Eastsound UGA to comply with RCW 36.70A.110(3) and
23 RCW 36.70A.020(12)?¹⁸

24 We will discuss these issues together.

25 The June 20, 2006 Final Decision and Order/Compliance Order found,
26
27

28 ¹² Id. at Conclusion of Law F.

29 ¹³ Id at 22.

30 ¹⁴ Petitioner's Brief Compliance Hearing at 18 and 19. Petitioner's Brief at 2.

31 ¹⁵ Petitioner's Brief at 2.

32 ¹⁶ Objections to a Finding of Compliance at 1.

¹⁷ Final Decision and Order/Compliance Order (June 20, 2006) at Conclusion of Law A at 34.

¹⁸ Id. at Conclusion of Law F.

1 The County's capital facilities plan for sewer and storm drainage facilities for the
2 Eastsound UGA is not compliant with RCW 36.70A.070(3)(a) – (d).¹⁹

3
4 Because the capital facilities plan fails to provide for urban levels of sewer service to
5 all areas of the UGA during the 20-year planning period, the boundaries of the UGA
6 are not compliant with RCW 36.70A.110(3) and (4); and RCW 36.70A.020(12).²⁰

7 Ordinance 39-2008 amended the County's Comprehensive Plan to incorporate by reference
8 the Eastsound Water and Sewer District's (District) 2008 Update of 2003-2023 General
9 Sewer Plan.²¹ The sewer capital facilities plan now includes an inventory of existing sewer
10 capital facilities, a forecast of future needs and the proposed locations of new facilities to
11 support the entire UGA and a six-year capital facility financing plan.²² The sewer plan also
12 shows how sewers will be financed over the 20-year life of the plan.²³

13
14 Petitioner Austin alleges that "public money" as referenced in RCW 36.70A.070(3)(d) means
15 money from a municipal corporation, such as a city or county, and does not mean the
16 District's user fees, surcharges, and capital reserve funds which she argues are not sources
17 of public money. Since the District uses these sources, Petitioner Austin contends that such
18 use violates the GMA.²⁴ Sewer Districts are authorized by RCW 57.02.020. The Board
19 has held that counties can rely on water and sewer districts to provide capital facilities to
20 UGAs as long as the plan is incorporated into the comprehensive plan to fulfill GMA
21 requirements.²⁵ The Board agrees with the County that the sources of money to which
22 Petitioner objects are commonly used to fund sewer plans and that the District is authorized
23 by RCW 57.08.050 to fix rates, assess connection charges, and sell bonds.
24
25
26

27 _____
¹⁹ Id. at 11.

28 ²⁰ Id. at 22.

29 ²¹ Record at 000701.

30 ²² Record at 000714, 000719, 000731, and 000732..

31 ²³ Record at 000733.

32 ²⁴ Objections to a Finding of Compliance at 1 and 2.

²⁵ See Final Decision and Order/Compliance Order (Lopez Island UGA) at 14 and 15 and *Whidbey Island Environmental Network v. Island County*, WWGMHB 03-2-0008 at 11.

1 **Conclusion:** The District's Sewer 2008 Update of the 2003-2023 General Sewer Plan
2 adopted by reference into the County's Comprehensive Plan now complies with RCW
3 36.70A.070(3)(a)-(d), RCW 36.70A.110(3), and RCW 36.70A.020(12).
4

5 2. Extension of Sewer Lines Outside the UGA

6 **Positions of the Parties**

7 *Petitioners' Position*

8 Petitioner Klein charges the District's sewer plan is not coordinated or consistent with the
9 County's land use element because the District's map of existing and proposed facilities
10 shows that the District's sewer service area extends east and west of the UGA boundaries
11 and shows extension of sewer lines outside of the UGA. Petitioner Klein argues that the
12 extension of lines outside of UGA boundaries does not comply with RCW 36.70A.110(4)
13 and is not consistent with the County's statement that "Existing regulations prohibit the
14 extension of urban services out of UGAs, master planned resorts, or areas of more intense
15 rural development", as referenced in the Board's Order Granting Extension and Denying
16 Motion for Invalidation.²⁶
17
18

19 Petitioner Klein points out various sewer lines that extend beyond the UGA that include:

20 (1) an existing sewer line east of the UGA serves Bartwood Estates and was constructed in
21 the 1990's and in 2003 extended to serve Scenic Lane, (2) a sewer line on Sunset Avenue
22 that he says was built in 2006 funded by Developer Funds and is scheduled to be extended
23 again, and (3) an additional sewer line extension east and south of the UGA boundaries that
24 is intended to serve Country Corner, an area proposed to be designated as a LAMIRD that
25 has not been designated as a LAMIRD.²⁷
26
27

28 Petitioner Austin argues the District has no legal contractual agreement with the County to
29 provide sewer service to the UGA or prevent sewer extension into rural areas as forbidden
30

31 ²⁶ Compliance Hearing Petitioners' Brief at 9 and 10.

32 ²⁷ Compliance Hearing Petitioner's Brief at 7 -9.

1 by SJCC 18.60.250. Petitioner Austin claims that the District is bound by its National
2 Pollution Elimination (NPDES) permit, and the County does not have the authority to
3 overrule federal law. Petitioner Austin also contends that it would be absurd, illegal, and
4 unethical for the District to allow a health or environmental hazard to develop before
5 extending a sewer line to an area with too many drainfields or allow an aquifer to degrade.
6

7 *County's Position*

8 The County states Petitioners' objections to lack of an agreement with the District and the
9 extension of sewer services outside of the UGA are not part of the compliance order and are
10 aspects of the new District sewer plan, and therefore should have been the subject of a new
11 petition.²⁸ Nevertheless, the County addresses Petitioners' allegations.
12

13
14 The County says that the District plan acknowledges circumstances under which sewer
15 service can be provided outside the UGA. The plan indicates service to the LAMIRD study
16 area which was identified in Ordinance 13-2005. The plan acknowledges the District is
17 concerned about existing, mature, non-rural neighborhoods to the east of the UGA with
18 aging septic drainfields that present a considerable risk to the Eastsound aquifer. The
19 County says its development regulations prevent extension to the Country Corner Area
20 unless it is designated a LAMIRD or where it is necessary to protect public health and
21 safety.²⁹
22

23
24 The County asserts the GMA does not require the removal of existing facilities from rural
25 areas. The County explains the 2003 version of the sewer plan did not show the UGA
26 boundaries but the version of the plan adopted by reference by the County shows the UGA
27 boundary. According to the County the District's sewer service area is defined by the
28 Certification of Necessity and approved by the Washington Department of Ecology
29
30

31 ²⁸ San Juan County's Response to Objection to a Finding of Compliance at 12.

32 ²⁹ Id. at 13.

1 (Ecology), but does not relieve the District from complying with applicable state and local
2 statutes.³⁰

3
4 In regard to Petitioner Austin's argument that the County has no agreement with the District,
5 the County responds that Petitioner does not cite any authority that requires this nor did the
6 Board's order find the lack of an agreement to be noncompliant.

7
8 **Board Discussion**

9 The Board will first address the County's argument that if Petitioner Klein wanted to
10 challenge the inconsistency of the land use element and the capital facilities element, he
11 needed to file a new petition. The County adopted the District's sewer plan to achieve
12 compliance with the RCW 36.70A.070(3). RCW 36.70A.070 requires that all elements of
13 the comprehensive plan be consistent and coordinated with each other. The Board's
14 compliance order also found that the District's sewer plan did not show how sewer was
15 going to be provided throughout the UGA and the sewer plan did not comply with RCW
16 36.70A.110(3) and (4).³¹ The issue in the compliance order and before the Board now is
17 how does the County intend to have sewer services provided to the Eastsound UGA in a
18 compliant manner. Therefore, when the County adopts a new part of its capital facilities
19 element, it must be consistent with the other parts of the plan and comply with the GMA.
20
21 When the County adopted the District's sewer plan as part of the County's Comprehensive
22 Plan, it triggered the requirement that the sewer plan must be consistent with the County's
23 land use element. Therefore, Petitioner did not have to file a new petition to challenge the
24 capital facilities element to raise objections concerning the consistency of the District's
25 sewer plan with the land use element.
26
27

28 The challenge to the consistency of the District's sewer plan and the land use element
29 presents a difficult dilemma for the County which must rely on the District to provide urban
30

31 ³⁰ Id. at 15.

32 ³¹ Final Decision and Order/Compliance Order at 22.

1 services to Eastsound UGA. Complicating this, the GMA does not apply to the development
2 of plans of special districts, including water and sewer districts so the Board has no
3 jurisdiction over their plans. See RCW 36.70A.280(1).

4
5 RCW 57.16.010 outlines the process for adoption of sewer and water district comprehensive
6 plans and amendments. This process includes approval of the sewer comprehensive plan
7 by the County and specifically requires that the “comprehensive plan shall not provide for
8 the extension or location of facilities that are inconsistent with the requirements of RCW
9 36.70A.110”.

10
11 A 2001 Certificate of Necessity (Certificate) granted by Ecology defines the boundaries of
12 the District’s sewer service area. This Certificate states that Ecology’s approval does not
13 relieve the District from complying with other state and local statutes.³² The local regulation
14 that applies in this situation is SCC 18.60.250(D)(1) which prohibits urban level facilities and
15 services outside of UGAs, Master Planned Resorts, or LAMIRDs that had not been
16 completed, were being constructed, or had completed planning or budgeting by January 1,
17 2001.³³

18
19
20 While the Board has no jurisdiction over County approval of the District’s Plan pursuant to
21 RCW 57.16.10, it does have jurisdiction to determine whether the County’s Comprehensive
22 Plan’s capital facilities element, of which the District’s sewer plan is now a part, complies
23 with the GMA.
24

25
26 Petitioner Klein says the District’s Sewer Plan shows extensions outside of the UGA, which
27 violates the GMA. The Board notes the extension on Bartel Road, which Petitioner says
28 was constructed in the 1990s, was constructed before the boundaries of the UGA were
29 reduced in 2005 and before the 2001 date indicated in SCC 18.60.250(D)(1) so they would
30

31 ³² Record at 000830.

32 ³³ Projects meeting those criteria are considered pre-existing projects.

1 be considered existing facilities. Another smaller sewer extension outside the UGA pointed
2 out by Petitioner is the extension on Sunset Avenue which the District's Plan indicates was
3 completed in 2006.³⁴ The Board notes that completion was after the UGA's reduction by
4 Ordinance 13-2005. However, there is no evidence in the record for the Board to evaluate
5 whether the County ignored SCC 18.60.250(D)(1) or that construction was underway before
6 boundaries of the UGA were reduced for this sewer extension. The Board agrees with the
7 County that there is no requirement that existing sewer facilities need to be removed.
8

9
10 Petitioner Klein questions the District's proposal to improve the sewer line on Sunset
11 Avenue.³⁵ Petitioner Klein declares he had conversations with the District's manager that
12 the County pressured the District to call this capital facility's project an improvement rather
13 than an extension.³⁶ The District's map illustrating existing and proposed facilities shows
14 the current extension outside the UGA as an existing facility and shows no further
15 extension.³⁷ At the Board's request, the County was asked to clarify what constituted the
16 "improvements" on Sunset Avenue listed as funded by a Developer Extension Agreement.
17 Letters from the County requesting this information provided by the County and the
18 Petitioner do not constitute improper pressure.³⁸ A November 12, 2008 District letter states
19 the improvements are not an extension.³⁹
20

21
22 However, the long proposed sewer extension along Mount Baker Road and Terrill Beach
23 Road extending far from the UGA boundaries proposed to serve Country Corner, an area
24 the County is considering designating a LAMIRD, and potential health hazards, concerns
25 the Board. Both Petitioner Austin and the District's Plan express concern about urban style
26

27
28 ³⁴ Record 000731.

29 ³⁵ Compliance Hearing Petitioner's Brief at 8.

30 ³⁶ There is no indication in the record that Petitioner Klein submitted his declaration to County during the
31 compliance proceedings. Therefore, the Board will not consider it.

32 ³⁷ Record at 000714.

³⁸ Exhibit A to San Juan County's Supplemental Authority.

³⁹ Attachment B to San Juan County's Supplemental Authority.

1 subdivisions outside the UGA presenting potential for pollution of the Eastsound aquifer. No
2 documentation of aquifer contamination exists in the record. Likewise, while urban services
3 can be provided in a LAMIRD, under conditions that do not promote urban sprawl, no
4 evidence is contained in the record that the Country Corner area has been designated a
5 LAMIRD.

6
7 This situation is analogous to a similar situation in Thurston County. In that situation the
8 Supreme Court found noncompliant an extension of a proposed sewer line to a more
9 densely developed rural area where no threat to human health had been documented and
10 which had not been designated a LAMIRD .⁴⁰ The Court also noted the pressure to
11 urbanize the extension of urban services creates:
12

13 ...we find it significant that the GMA seeks to reduce "the inappropriate
14 conversion of undeveloped land into sprawling, low-density development." RCW
15 36.70A.020(2). The provision at issue, which guards against the extension or
16 expansion of urban governmental services into designated rural areas, is
17 certainly consistent with that purpose. So also is the Board's conclusion that
18 "[t]he Legislature has recognized that intrusion or extension of urban services to
19 rural areas inevitably creates pressure to urbanize. That is the reason that the
20 strict 'necessary to protect' test was adopted rather than a 'betterment of health
or environment' standard." (reference eliminated)⁴¹

21 Therefore, the Board disagrees with Petitioner Austin that the County's Comprehensive Plan
22 should propose sewer lines outside of a UGA where a documented health hazard may
23 occur in the future. By including the District Plan's proposed extensions outside the UGA,
24 including an extension to a nonexistent LAMIRD, where no documented health hazard
25 exists, and no investigation of other alternatives to sewer service has been discussed in its
26 capital facilities element, the County's capital facilities element for sewer service does not
27 comply with RCW 36.70A.110(4). Such extensions increase the pressure to urbanize in
28 rural areas and increase the potential for sprawl in violation of RCW 36.70A.020(2). Also,
29
30

31 ⁴⁰ *Thurston County v. Cooper Point Association*, 148 Wn.2d1 at 9-11.

32 ⁴¹ *Id.* at 13.

1 these extensions make the capital facilities element and the land use element inconsistent
2 in violation of RCW 36.70A.070.

3
4 Both Petitioners Klein and Austin contend the County and District's lack of agreement
5 violate the GMA and the Board's order, while the County argues the Board has no authority
6 to mandate agreement. Despite rulings in the past in other cases⁴², the Board agrees that
7 we have no such authority. However, RCW 57.16.010 requires the County to approve the
8 District's Plan and the incorporation of the District's Plan into the County's Comprehensive
9 Plan constitutes agreement. Further, according to RCW 57.16.010, the County only needed
10 to adopt certain parts of the District's plan. More specifically, the County only needed to
11 incorporate the parts of the District's Plan necessary to fulfill GMA requirements and comply
12 with the GMA.
13

14
15 **Conclusion:** By including the District Plan's proposed extensions outside the UGA
16 including an extension to a nonexistent LAMIRD, an area where no documented health
17 hazard exists, and no investigation of alternatives to sewer service is discussed in its capital
18 facilities element, the County's capital facilities element for sewer service does not comply
19 with RCW 36.70A.110(4), RCW 36.70A.070, and RCW 36.70A.020(2).
20

21 B. Storm Drainage Financing Plan

22 Issue Two: Does the County's capital facilities element include a six-year financing plan for
23 its storm drainage facilities for the Eastsound UGA in order to comply with RCW 36.70A.070
24 (3)(a) – (d) and RCW 36.70A.020(12)?

25 The June 20, 2006 Compliance Order/Final Decision Order found,
26

27 ...the County's capital facilities element for storm drainage facilities does not
28 comply with RCW 36.70A.070 (a)–(d) until it is incorporated into the County's
29 comprehensive plan and contains a six-year financing plan that identifies funding
30 capacities and sources of public funding. Additionally, the storm drainage plan
31

32 ⁴² See Final Decision and Order/Compliance Order – Lopez Island UGA (April 2006) at 17.

1 needs to show how storm drainage facilities will be provided over the 20-year
2 planning period to comply with RCW 36.70A.110(3) and RCW 36.70A.020(12).⁴³

3 Ordinance 33-2008 adopts a 20-year storm drainage plan for the Eastsound UGA as part of
4 the San Juan Comprehensive Plan.⁴⁴ The storm drainage plan includes an inventory and
5 locations of existing facilities and proposed locations and capacities of needed facilities over
6 the 20-year life of the plan⁴⁵, a six year financing plan⁴⁶, and a plan to fund the 20-year
7 storm drainage plan projects⁴⁷. This plan represents an impressive effort for a small, rural
8 county.
9

10
11 Petitioners raise no objections to a finding of compliance.
12

13 **Conclusion:** The adoption of the Long Range Drainage Plan Proposal for the Eastsound
14 Village UGA by Ordinance 33-2008 as part of San Juan County's Comprehensive Plan
15 brings the capital facilities plan for storm drainage facilities for the Eastsound UGA into
16 compliance with RCW 36.70A.070 (3)(a) – (d) and RCW 36.70A.020(12).
17

18 C. Less than Urban Densities in the UGA
19

20 Issue Four: Are the areas within the UGA zoned for less than urban densities based on the
21 local circumstances that warrant such lower densities in order to comply with RCW
22 36.70A.020 (1) (2) and RCW 36.70A.110(1)?
23

24 The June 20, 2006 Final Decision and Order/Compliance Order found,
25

26 The record does not show, or has the County claimed that local circumstances
27 dictate a need for suburban zoning for properties designated Eastsound
28 residential – one unit per acre or Eastsound – two units per acre. Under these
29 circumstances this designation is not an appropriate density for a UGA.⁴⁸

30 ⁴³ Final Decision and Order/Compliance Order at 12.

31 ⁴⁴ Record at 00563.

32 ⁴⁵ Record at 000621, 000628 – 000641.

⁴⁶ Record at 000666.

⁴⁷ Record at 000667.

⁴⁸ Final Decision and Order/Compliance Order at 21.

1 Resolution 42-2008 adopted the analysis in the April 15, 2008 Staff Report that concluded
2 the properties shown on the Eastsound UGA official maps designated at suburban densities
3 are existing parcels on or near shorelines.⁴⁹ The Record shows these parcels are affected
4 by wetlands, steep slopes, poor soils, flood zones, and archaeological sites.⁵⁰ Additionally,
5 sewer service will be provided to these areas during the 20-year planning period.⁵¹
6
7

8 Petitioners do not object to a finding of compliance.
9

10 **Conclusion:** The findings in Resolution 42-2008 are supported by the analysis in the April
11 15, 2008 staff report. The analysis describes the local circumstances that support zoning at
12 less than urban densities in the Eastsound UGA. Based on the County's analysis, the
13 zoning for these areas in the UGA now comply with RCW 36.70A.020(1) and (2) and RCW
14 36.70A.110(1).
15

16 D. Land Supply Analysis

17 Issue Three: Has the County's "shown its work" for the Eastsound UGA's commercial and
18 institutional needs and adequately analyzed the needed land for commercial and
19 institutional uses to cause the boundaries in order to comply with RCW 36.70A.110(2) and
20 RCW 36.70A.115?
21

The Board's June 20, 2006 Compliance Order found,

22 The County has not "shown its work" that it has assessed the commercial and
23 institutional needs of the Eastsound UGA or that it has adequately analyzed land
24 supply to meet these needs of the Eastsound UGA's future residents. Therefore, in
25 light of the entire record, the land capacity analysis of the Eastsound UGA's future
26 commercial and institutional needs does not comply with RCW 36.70A.110(2) and
27 RCW 36.70A.115.⁵²
28
29

30 ⁴⁹ Record at 000422.

⁵⁰ Record at 000441 to 000444.

⁵¹ Record at 000443.

⁵² Id. at Final Decision and Order/Compliance Order at 17.

1 **Positions of the Parties**

2 County's Land Supply Analysis

3 The County estimates that the population of Orcas Island is expected to grow by 1,913
4 persons to a population of 6,869 by 2020. The County plans to accommodate 50 percent of
5 that growth in the Eastsound UGA, or about 956 people. Based on average household size
6 of 2.13 people, the UGA needs to accommodate about 449 dwelling units.⁵³ The County
7 included a 25 percent market factor and a 25 percent seasonal home factor in determining
8 its land supply. The County used the market factor to account for land that won't come on
9 the market or be available for development and the seasonal home factor as the number of
10 housing units that would not be available to permanent year round residents. The County
11 based the seasonal home factor on the 2000 census accounts that showed 25 percent of
12 Orcas Island's housing stock is seasonal housing. The combination of market and seasonal
13 home market factor increases the UGA's need for sufficient land to accommodate 673
14 homes.⁵⁴

15
16
17
18 The County also projected that while most current institutional uses could expand on their
19 current sites, another 3.4 acres of land would be occupied by institutional uses.⁵⁵ The
20 County estimated the UGA would need 8.6 acres of land for commercial uses.⁵⁶

21
22 The County made various assumptions about the developability of vacant and partially
23 vacant parcels in the Eastsound UGA to determine the UGA's land supply. This analysis
24 concluded that the County had land supply to accommodate 687 dwelling units, with 20 of
25 these being accommodated on VC zoned land, 16 acres of vacant commercial land, and
26 that the institutional uses could be absorbed by the supply of land provided by the market
27
28

29
30 ⁵³ Record at 000429.

31 ⁵⁴ Record at 000430-31.

32 ⁵⁵ Record at 000440.

⁵⁶ Record at 000443.

1 and seasonal housing factors.⁵⁷

2
3 Petitioners' Position

4 Petitioner Klein criticizes the County's assumptions and methods of determining land
5 supply. Petitioner says it was erroneous for the County to assume that all the land supply in
6 the Village Residential (VR) zone would be used for residential uses, as over the last 20
7 years 80 percent of the new growth on VR zoned land was used for institutional uses.

8 Petitioner contends that the County's application of the market factor to account for
9 available land to accommodate institutional uses misuses the market factor which should be
10 reserved for land that is unlikely to be available to meet required needs and amounts to
11 "double counting" when determining available land supply. According to Petitioner,
12 because all the institutional uses have been built in the VR zone, land supply in the VR zone
13 must be reduced by an area that would support 27 dwelling units, based on the County's
14 calculation that the land will accommodate 8 units per acre, so that the residential land
15 supply would accommodate only 660 units.⁵⁸ Petitioner further questions the devotion of
16 the entire residential land supply in the VR zone to residential use because numerous lots in
17 the VR zone now are occupied by commercial uses.⁵⁹

18
19
20
21 Petitioner doubts the County assumptions that the Village Commercial zone which allows for
22 residential uses will accommodate 20 units over the next 20 years when over the last 22 no
23 residential units to his knowledge have been built in the VC zone.⁶⁰

24
25 Petitioner also criticizes the County for not fully utilizing the assessor's records to analyze
26 deed restrictions on various lots in the VR zone, which he asserts significantly reduce the
27 supply of land. Petitioner concludes from his analysis that the County underestimated land
28

29
30 ⁵⁷ Record at 000432, 000436, and 000440.

31 ⁵⁸ Petitioners Brief Compliance hearing at 14.

32 ⁵⁹ Petitioner's Brief Compliance Hearing at 13, 16 and 17.

⁶⁰ Id. at 19.

1 supply by at least another 44 dwelling units⁶¹ Because Petitioner did not present these
2 documents to the County, so that it could respond, the Board will not consider this
3 information.⁶²

4
5 Petitioner Campbell argues that if the County is correct that the VC zone is adequate for
6 planned commercial and institutional growth, these uses should be eliminated from the VR
7 zone. Petitioner maintains these lands are critical to providing enough residential land,
8 especially land for affordable housing.⁶³

9
10 County's Response

11 The County responds that the market factor used by the County "provides for the possibility
12 that the land will be held off the market or that some residential and commercial properties
13 would be developed with other uses". The County says it recognized that some mechanism
14 must be used to account for the fact that land use districts in the UGA allow for a variety of
15 uses and the County chose the market factor to do this. The County maintains this method
16 addresses the local circumstances in the UGA and is within the County's discretion.

17
18 According to the County, the market factor is large enough to account for the possible
19 development of nonresidential uses in the VR zone and noncommercial uses in the VC
20 zone while ensuring ample land supply for residential and commercial uses.⁶⁴

21
22 The County explains that if all the institutional and commercial growth occurs in the VR
23 zone, a total of 12 acres, that would leave additional land in the VC zone for residential
24 development. Likewise, if all the 3.4 acres of projected institutional growth takes place in
25 the VC zone, it would still leave enough land for projected commercial growth.⁶⁵

26
27 Additionally, in the VC zone, the County acknowledges that most of the property will be
28

29 _____
30 ⁶¹ Id. at 15,16,and 18.

31 ⁶² See Preliminary Matters at 7 Supra.

32 ⁶³ Petitioner's Brief at 2 and 3.

⁶⁴ San Juan County Response to Objections to a Finding of Compliance at 19.

⁶⁵ Id. at 20.

1 used for commercial purposes and only assigns 20 dwelling units to the VC zone.

2
3 **Board Discussion**

4 The following parts of the GMA apply to this issue:

5 RCW 36.70A.110(2) states (in pertinent part),

6 Based upon the growth management population projection made for the county
7 by the office of financial management, the county and each city within the county
8 shall include areas and densities sufficient to permit the urban growth that is
9 projected to occur in the county or city for the succeeding twenty-year period...

10 ...An urban growth area determination may include a reasonable land market
11 supply factor and shall permit a range of urban densities and uses. In
12 determining this market factor, cities and counties may consider local
13 circumstances. Cities and counties have discretion in their comprehensive plans
14 to make many choices about accommodating growth.

14 RCW 36.70A.115 states,

15 Counties and cities that are required or choose to plan under RCW 36.70A.040
16 shall ensure that, taken collectively, adoption of and amendments to their
17 comprehensive plans and/or development regulations provide sufficient capacity
18 of land suitable for development within their jurisdictions to accommodate their
19 allocated housing and employment growth, as adopted in the applicable
20 countywide planning policies and consistent with the twenty-year population
21 forecast from the office of financial management.

21 To determine if a UGA has sufficient land to accommodate urban growth, a land capacity
22 analysis is necessary. The Board has characterized the land capacity in this way:

23 It is prospective – looking forward over the coming 20 years to see if there is
24 enough land within the UGA to accommodate the growth that has been
25 allocated to the area. However, part of this determination of how much land is
26 available is filled with assumptions or “educated guesses” that lack absolute
27 certainty....

28 This lack of precision permeates the entire process because the assumptions
29 are largely qualitative, reach into the distant future, and reasonable people can
30 disagree about them.⁶⁶

31 ⁶⁶ *Petree v. Whatcom County*, WWGMHB Case No.08-2-0021c (Final Decision and Order, October 13, 2008)
32 at 27.

1 The Board agrees with Petitioner Klein that while the Board's analysis specifically
2 mentioned concerns about the County's past analysis of commercial and institutional uses,
3 it was appropriate for the County to update its land capacity analysis because of the
4 interrelationships of commercial, institutional, and residential uses due to proximity and the
5 uses allowed in residential and commercial districts.⁶⁷ For this reason, the Board needs to
6 evaluate the County's residential land capacity as well as commercial and institutional land
7 capacity.
8

9
10 One of San Juan County's land capacity assumptions Petitioner Klein challenges is the
11 capacity of the VR zone to accommodate the amount of dwelling units assigned to it in the
12 land capacity analysis. Petitioner's challenge is based on the assumption that this zone will
13 be entirely devoted to residential use even though the zoning code allows commercial and
14 institutional uses and in the past, the majority of growth in institutional uses has taken place
15 there as well as numerous commercial uses. The County accounts for future absorption of
16 the VR zoned land by institutional uses by reasoning that the extra land provided by the
17 market and seasonal housing factor will provide for that demand. Neither the County nor
18 Petitioner Klein provided an assumption for how much VR zoned land will be absorbed by
19 commercial uses. The County does say that if commercial uses all locate in the VR zone,
20 then the VC zone that allows for residential uses will be available for residential uses.
21 Petitioner Klein also objects to the County's use of the additional land provided by the
22 market factor to account for institutional land.
23
24

25 While land use assumptions are "educated guesses" on which reasonable people can
26 disagree, the Board agrees with Petitioner Klein that given past history, commercial uses
27 will most likely continue to take up some of the land in the VR zone. However, the Board
28 disagrees that additional land supply provided by the market factor cannot be used to
29 account for institutional land. RCW 36.70A.110(2) requires that the County "shall include
30

31
32 ⁶⁷ Petitioner's Brief Compliance Hearing at 12.

1 areas and densities sufficient to permit the urban growth that is projected to occur in the
2 county or city for the succeeding twenty-year period...” According to the County’s land
3 capacity analysis all the County actually needs to provide is 449 dwelling units to
4 accommodate its projected growth.
5

6 RCW 36.70A.110(2) also allows that “An urban growth area determination *may* include a
7 reasonable land market supply factor”. (emphasis added). The Board reads this to mean
8 that while the County can provide for additional land over and above what the County’s land
9 capacity analysis says it actually needs to provide for sufficient land to accommodate its
10 projected population, the use of a market factor is not required. San Juan County says it
11 has provided for a 25 percent market factor, which it characterizes as “a typical value for a
12 market factor used in many communities in the state” and 25 per cent seasonal home factor,
13 which, for the purpose of a land capacity analysis actually add up to a 50 percent market
14 factor.⁶⁸ Petitioner has not challenged the size of the market or seasonal home factor.
15 Using the market factor to account for institutional uses has the effect of reducing the
16 market factor. While a market factor is a useful tool in ensuring adequate land supply over
17 the 20-year life of the plan, it is not required. Thus, the Board does not find it clearly
18 erroneous for San Juan County to reduce the market factor to account for institutional land.
19
20
21

22 Likewise, it would not be clearly erroneous for the County to reduce the market factor to
23 account for commercial land that might occupy VR zoned land. The County counters
24 Petitioner Klein’s objection to the lack of assumption for how much VR land will be absorbed
25 by commercial uses by contending that if all of the 8.6 acres of projected commercial uses
26 occurs on VR land, enough land will be left in the VC zoned land for residential uses.
27 Without providing the Board with any actual land costs to support his assumption that VC
28

29
30 ⁶⁸ Record at 000400. Until the Supreme Court’s decision in *Thurston County v. Western Washington Growth*
31 *Management Hearings Board*, the Growth Management Hearings Board held that 25 percent was a
32 reasonable market factor. The Supreme Court ruled in that case that the Boards could not establish a bright
line for a market factor and the market factor should be based on local circumstances.

1 zoned land will always cost more than VR zoned land, Petitioner Klein contends that the
2 price of VC zoned land has caused commercial uses to locate in the VR zone and that will
3 deter residences from locating in the VC zone, as evidenced by the lack of residences there
4 now. While Petitioner Klein has not provided the Board with an assumption or the basis for
5 an assumption of how much VR land will be taken up with commercial uses, based on past
6 history, the Board agrees that it is likely some new commercial uses would occupy VR
7 zoned land.
8

9
10 While it may be likely that commercial uses will occupy VR zoned land, the resulting loss of
11 residential land may be accommodated due to the County's use of both a market factor and
12 a seasonal home factor. Furthermore, there is no data in the record showing what the past
13 percentage of commercial uses on VR zoned land is, or an educated assumption for the
14 amount of commercial uses occupying VR zoned land. As for the other County
15 assumptions, the Board also finds it reasonable for the County to assume that 20 residential
16 units over the planning period will be located on VC zoned land as mixed use areas are now
17 being seen as desirable places to live. Second story residences over commercial and
18 apartments in the VC zone could be affordable. The Board finds it reasonable for the
19 County to use a seasonal home factor on a sought after recreational area like Orcas Island
20 to provide for additional land capacity. However, the County bases this on the 2000 census
21 that showed 25 percent of the housing units on Orcas Island were seasonal housing. The
22 Board considers that it is probably unlikely that all of these seasonal homes would be
23 located in the Eastsound UGA. Therefore, using a 25 percent seasonal home factor for the
24 UGA most likely provides for more capacity for this type of housing than is needed and
25 could provide the extra capacity necessary for permanent year-round housing.
26
27

28
29 As for Petitioner Campbell's contention that the County should be compelled to bar
30 commercial and institutional uses from the VR zone, the Board finds that while the County
31 must accommodate its projected residential growth, how its regulations provide for it is
32

1 within the County's discretion. Barring commercial and institutional uses from the VR zone
2 also would ignore the historical mixed use village nature of this zone and the trend in zoning
3 to not separate commercial and residential uses. The Board is sympathetic to Petitioner
4 Campbell's desire to provide cheaper land for affordable housing, but the issue before us is
5 whether the County has provided adequate land supply in the UGA within the parameters of
6 the GMA that includes consideration of local circumstances and the discretion afforded to
7 the County to make choices on how to accommodate growth.
8

9
10 **Conclusion:** The County is obligated to provide sufficient land to accommodate its
11 projected growth which is land for 449 housing units, 8.6 acres of land for commercial uses,
12 and 3.4 acres for institutional uses. The County estimated the UGA could provide for 687
13 dwelling units. This would be somewhat in excess of 673 dwelling units that would be
14 needed to provide for the County's 2020 population as well as a 25 percent market and a 25
15 percent seasonal home factor. The County's methodology actually reduced this market
16 factor for its residentially zoned land to provide for institutional uses on residentially zoned
17 land. This market factor will likely be reduced further due to the likelihood that the County
18 allows for commercial uses in residential zones and past history of those uses occupying
19 some residential land. However, even assuming all new commercial and institutional uses
20 will occupy VR-zoned, it appears that the UGA can accommodate its projected residential,
21 commercial, and institutional growth with a smaller market factor than the County has
22 employed. Nevertheless, since the GMA does not require use of a market factor and due to
23 local circumstances of village zoning that mixes residential, commercial, and institutional
24 uses in its VR and VC zones, the Board does not find it clearly erroneous to allow the
25 market factor to account for the uncertainty and lack of precision of determining where uses
26 will eventually locate in the future. Therefore, the Board finds that in light of the entire
27 record, the land capacity analysis for Eastsound UGA's commercial, institutional, and
28 residential uses is not a clearly erroneous violation of RCW 36.70A.110(2) and RCW
29
30
31
32

1 E. Issues That Are Not Before the Board on Compliance

2 Issue 7: Does the Eastsound UGA provide for affordable housing?

3 Issue 8: Does the Eastsound UGA provide for enough industrial land?

4 Issue 9: Does the Eastsound UGA's capital facilities plan provide for adequate water
5 service to the UGA?

6 Both Petitioners Klein and Campbell argue that the land capacity analysis does not address
7 affordability.⁶⁹ Petitioner Campbell alleges that the land capacity analysis does not provide

8 an analysis of whether there is adequate land for industrial/commercial uses in the

9 Eastsound UGA such as aircraft and auto related, construction related, and equipment

10 repair due to the location in an Industrial Service Zone surrounded by residential uses.⁷⁰

11 Petitioner Austin points out that the Eastsound Water Supply Report and Recommendations
12 and abbreviated Coordinated Water system Plan (sic) was not included in the record.

13 Petitioner alleges that this report does not include a financing plan and lists numerous
14 supply and contamination problems in Eastsound.⁷¹

15
16
17 The June 20, 2006 Final Decision and Order/Compliance Order did not find noncompliance
18 on any of these issues, therefore these issues are not before the Board for compliance. For
19 the Board to address these issues, Petitioners needed to file a new petition. Petitioners
20 have not done so, so these issues are not before the Board to decide.

21
22
23 **Conclusion:** The issues of whether the Eastsound UGA provides for affordable housing,
24 adequate water supply, and adequate water service are not before the Board on compliance
25 and have not be raised in a Petition for Review, therefore the Board has no jurisdiction over
26 these issues pursuant to RCW 36.70A.330⁷².

27

28

29

30

31

32

⁶⁹ Petitioner's Brief Compliance Hearing at 18 and 19. Petitioner's Brief at 1 and 2.

⁷⁰ Petitioner's brief at 1.

⁷¹ Objections to a Finding of Compliance at 1.

⁷² See *Port Townsend v. Jefferson County*, WWGMHB 94-2-0006(Compliance Order, December 12, 1994).

1 F. Invalidity

2 Petitioner requests that the Board impose an order of invalidity on the Eastsound UGA due
3 to the County’s long-term failure to reach compliance and lack of progress toward
4 coordinated and consistent boundaries for the UGA and the delivery of urban services.⁷³

5
6 The County responds that Petitioner has not identified what part of the plan or regulation on
7 which invalidity should be imposed. The County states it has brought the UGA into
8 compliance so invalidity cannot be imposed.⁷⁴

9
10 **Board Discussion**

11 While the Board has ruled that long-term failure to meet schedules of compliance could
12 result in a finding of invalidity, the Board has also ruled: “... invalidity should be imposed if
13 continued validity of noncompliant regulations would substantially interfere with the local
14 jurisdiction’s ability to engage in GMA compliant-planning”. *Futurewise v. Thurston County*,
15 WWGMHB Case No. 05-2-0002 (Final Decision and Order, February 12, 2004). Also see
16 *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c (Order Finding Noncompliance
17 and Invalidity, February 2, 2004).⁷⁵ In this order, the Board has found compliance on all
18 issues except one, albeit a very serious issue. The Board found that the Eastsound UGA’s
19 sewer capital facilities plan shows that it plans to extend sewers outside the UGA to areas
20 that have not been documented as a health hazard or designated as a LAMIRD.
21

22
23
24 The County asserts that it issued 21 building permits on existing lots of less than five acres
25 outside the UGA.⁷⁶ The District’s records show that it has made four connections to sewer
26 outside the UGA since October 25, 2005.⁷⁷ The County declares that only one of the
27 building permits for existing lots outside the UGA indicated a sewer connection. The Board
28

29 ⁷³ Petitioner’s Brief Compliance Hearing at 24.

30 ⁷⁴ San Juan County’s Response to Objections to a Finding of Compliance at 23.

31 ⁷⁵ Final Decision and Order/Compliance Order at 30.

32 ⁷⁶ County’s Supplemental Authorities at 4.

⁷⁷ County’s Supplemental Authorities at 4, Exhibit B.

1 is concerned that a small number of sewer connections have occurred outside the UGA
2 since the adoption of Ordinance 13-2005 that adopted the current boundaries of the UGA in
3 an apparent violation of SCC 18.60.250(D)(1). Nevertheless, a violation of enforcement of
4 the County's development regulations is a matter for the courts.
5

6 With the incorporation of the Eastsound's sewer capital facilities plan into the
7 Comprehensive Plan, the plan now shows that sewer service can be provided to the UGA in
8 compliance with RCW 36.70A.070(3)(d) and RCW 36.70A.110(3).
9

10 The noncompliant sewer extensions outside the UGA are slated for 2014-2015. Therefore,
11 although noncompliant, their presence in the Comprehensive Plan does not pose a threat to
12 proper GMA planning at this time and the County has time to amend its capital facilities'
13 element before these extensions are scheduled to occur.
14

15 **Conclusion:** Based on the foregoing, the Board declines to impose invalidity at this time.
16

17 VII. FINDINGS OF FACT

- 18 1. San Juan County is located west of the crest of the Cascade Mountains and plans
19 in accordance with RCW 36.70A.040.
- 20 2. Petitioners Fred Klein, John Campbell, and Dorothy Austin filed a petition in at
21 least one of these cases that are being heard together.
- 22 3. The June 20, 2006 Final Decision and Order/Compliance Order found that San
23 Juan County's designation of the 2005 Eastsound UGA was not compliant for the
24 following reasons: (1) failure to incorporate financing plans for sewer and storm
25 drainage facilities in the County's six-year capital facilities plan, (2) "failure to show
26 its work" for commercial and institutional uses and adequately analyze the need for
27 commercial and institutional land, (3) zoning areas within the UGA at less than
28 urban densities without showing the local circumstances that warrant these lower
29 densities, and (4) failure of the capital facilities element to show that urban levels
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1 of service are planned within the entire UGA in the 20-year planning period. That
2 Order also found that the County's designation of the Eastsound UGA ~~also~~ was
3 noncompliant because it did not have a capital facilities plan that showed that
4 sewer service could be delivered to all parts of the UGA in violation of RCW
5 36.70A.110(3) and (4) and RCW 36.70A.020(2).
6

- 7 4. Ordinance 39-2008 amended San Juan County's Comprehensive Plan to
8 incorporate by reference the Eastsound Water and Sewer District's (District) 2008
9 Update of 2003-2023 General Sewer Plan.
- 10 5. The District's sewer capital facilities plan now includes an inventory of existing
11 sewer capital facilities, a forecast of future needs and the proposed locations of
12 new facilities to support the entire UGA and a six-year capital facility financing
13 plan. The referenced sewer plan also shows how sewers will be financed over
14 the 20-year life of the plan.
- 15 6. An issue in the compliance order and before the Board now is how does the
16 County intend to have sewer services provided to the Eastsound UGA in a
17 compliant manner.
- 18 7. RCW 57.16.010 outlines the process for adoption of comprehensive plans and
19 amendments to these plans of sewer and water districts. This process includes
20 approval of the sewer comprehensive plan by the County and specifically requires
21 that the "comprehensive plan shall not provide for the extension or location of
22 facilities that are inconsistent with the requirements of RCW 36.70A.110".
23
- 24 8. The 2001 Eastsound Sewer District Certificate of Need states that Ecology's
25 approval does not relieve the District from complying with other state and local
26 statutes.
- 27 9. SCC 18.60.250(D)(1) prohibits urban level facilities and services outside of UGAs,
28 Master Planned Resorts, or LAMIRDS that had not been completed, were being
29 constructed, or had completed planning or budgeting by January 1, 2001.
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- 1 10. The sewer extension on Bartel Road, which Petitioner says was constructed in the
2 1990s, was constructed before the boundaries of the UGA were reduced in 2005
3 and before the 2001 date indicated in SCC 18.60.250(D)(1) so they would be
4 considered existing facilities.
5
6 11. The District's Plan indicates the extension on Sunset Avenue was completed in
7 2006 after the UGA's reduction in 2006. There is no evidence in the record for the
8 Board to evaluate whether the County ignored SCC 18.60.250(D)(1) or that
9 construction was underway before boundaries of the UGA were reduced for this
10 sewer extension.
11
12 12. The District's map showing existing and proposed facilities show the Sunset
13 Avenue extension outside the UGA as an existing facility and shows no further
14 extension.
15
16 13. The District's 2014 -2023 Capital Facilities Plan shows that "improvements" to
17 Sunset Avenue are to be funded as a "Developer Extension Agreement".
18
19 14. A November 12, 2008 District letter states the "improvements" to Sunset Avenue
20 are not an extension.
21
22 15. The long proposed sewer extension along Mount Baker Road and Terrills Beach
23 Road extending far from the UGA boundaries is proposed to serve Country
24 Corner, an area the County is considering designating a LAMIRD and which the
25 District says contains development that is a threat to the Eastsound aquifer.
26
27 16. Ordinance 33-2008 adopts a 20-year storm drainage plan for the Eastsound UGA
28 as part of the San Juan Comprehensive Plan that includes an inventory and
29 locations of existing facilities and proposed locations and capacities of needed
30 facilities over the 20-year life of the plan, a six year financing plan, and a plan to
31 fund the 20-year storm drainage plan projects.
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- 1 17. Resolution 42-2008 adopted the analysis in the April 15, 2008 Staff Report that
2 concluded the properties shown on the Eastsound UGA official maps designated
3 at suburban densities are existing parcels on or near shorelines.
- 4 18. The Record shows the parcels in areas zoned for less than urban densities are
5 affected by wetlands, steep slopes, poor soils, flood zones, and archaeological
6 sites. Additionally, sewer service will be provided to these areas during the 20-
7 year planning period.
- 8 19. The County plans to accommodate 50 percent of Orcas Island's population
9 growth in the Eastsound UGA, or about 956 people. Based on the average
10 household size of 2.13 people, the UGA needs to accommodate about 449
11 dwelling units.
- 12 20. The County included a 25 percent market factor and a 25 percent seasonal home
13 factor in determining its land supply.
- 14 21. The County based the seasonal market factor on the 2000 census accounts that
15 showed 25 percent of Orcas Island's housing stock is seasonal housing.
- 16 22. The combination market and seasonal home factor increases the UGA's need for
17 sufficient land to accommodate 673 homes.
- 18 23. The County also projected that while most current institutional uses could expand
19 on their current sites, another 3.4 acres of land would be occupied by institutional
20 uses.
- 21 24. The County estimated the UGA would need 8.6 acres of land for commercial uses.
- 22 25. The County's land supply analysis concluded that there was enough land in the
23 Eastsound UGA to accommodate 687 dwelling units, with 20 of these being
24 accommodated on VC zoned land, 16 acres of vacant commercial land, and that
25 the institutional uses could be absorbed in the supply of land provided by the
26 market and seasonal housing factors.
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- 1 26. The zoning code allows commercial and institutional uses in the VR zone and, in
2 the past, the majority of growth in institutional uses has taken place there as well
3 as numerous commercial uses.
- 4 27. The market factor and the amount of land available for residential use will likely be
5 reduced further due to the likelihood the County allows for commercial uses in
6 residential zones and past history of those uses occupying some VR zoned land.
- 7 28. Even assuming all new commercial and institutional uses will occupy VR zoned
8 land, it appears that the UGA can accommodate its projected residential,
9 commercial, and institutional growth with a smaller market factor than the County
10 assumed in its land capacity analysis.
- 11 29. The issue of whether designation of the Eastsound UGA provides for affordable
12 housing is not before the Board for compliance.
- 13 30. The Board's June 20, 2006 Final Decision and Order/Compliance Order did not
14 find the land supply for industrial uses noncompliant.
- 15 31. The June 20, 2006 Final Decision and Order/Compliance Order did not address
16 the adequacy of the Eastsound UGA's capital facilities for supplying and delivering
17 water.
- 18 32. The noncompliant sewer extensions outside the UGA are slated for 2014-2015.
- 19 33. Any Finding of Fact later determined to be a Conclusion of Law is adopted as
20 such.
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24 **VIII. CONCLUSIONS OF LAW**

- 25 A. The Board has jurisdiction over the parties and the subject matter of these cases.
- 26 B. Petitioners Klein, Campbell, and Austin have standing to participate in these
27 compliance proceedings.
- 28 C. The District's Sewer 2008 Update of 2003-2023 General Sewer Plan adopted by
29 reference into the County's Comprehensive Plan now complies with RCW
30 36.70A.070(3)(a) –(d), RCW 36.70A.110(3), and RCW 36.70A.020(12).
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- 1 D. Petitioner did not have to file a new petition to challenge the capital facilities element
2 to raise objections concerning the consistency of the District's sewer plan with the
3 land use element.
- 4 E. While the Board has no jurisdiction over County approval of the District's Plan
5 pursuant to RCW 57.16.10, it does have jurisdiction to determine whether the County
6 Comprehensive Plan's capital facilities element which now includes the District's
7 sewer plan, complies with the GMA pursuant to RCW 36.70A.280(1).
- 8 F. By including in its Comprehensive Plan the District Plan's proposed sewer
9 extensions outside the UGA to a nonexistent LAMIRD, including to an area where no
10 documented health hazard exists, and to where no investigation of other alternatives
11 to sewer service is discussed in its capital facilities element, the County's capital
12 facilities element for sewer service does not comply with RCW 36.70A.110(4), RCW
13 36.70A.070, and RCW 36.70A.020(2).
- 14 G. The adoption of the Long Range Drainage Plan Proposal for the Eastsound Village
15 UGA by Ordinance 33-2008 as part of San Juan County's Comprehensive Plan
16 brings the capital facilities plan for storm drainage facilities for the Eastsound UGA
17 into compliance with RCW 36.70A.070 (3)(a) – (d) and RCW 36.70A.020(12).
- 18 H. The zoning for areas containing less than urban densities in the UGA comply with
19 RCW 36.70A.020(1) and (2) and RCW 36.70A.110(1).
- 20 I. RCW 36.70A.110(2) does not require use of a market factor.
- 21 J. It is not a clearly erroneous violation of RCW 36.70A.110(2) to allow the market factor
22 to account for the uncertainty and lack of precision of determining where uses will
23 eventually locate in Eastsound UGA .
- 24 K. In light of the entire record, the land capacity analysis for Eastsound UGA's
25 commercial, institutional, and residential uses is not a clearly erroneous violation of
26 RCW 36.70A.110(2).
- 27 L. The Board's May 7, 2001 Compliance Order in this case found the housing element
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1 compliant. Adoption of Resolution 42-2008 did not revise the housing element and
2 open it to challenge.

3 M. The issues of whether the designation of the Eastsound UGA provides for adequate
4 affordable housing and industrial land supply and its water system complies with the
5 GMA are not before the Board for compliance, so were not considered in this order
6 pursuant to RCW 36.70A.330.

7
8 N. Although noncompliant, the presence in the Comprehensive Plan of sewer Lines
9 outside the UGA does not substantially pose a threat to proper GMA planning at this
10 time.

11 O. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.
12

13 IX. ORDER

14 San Juan County must take legislative action to bring the capital facilities element of its
15 Comprehensive Plan regarding sewer service for the Eastsound UGA into compliance within
16 180 days in accordance with the following schedule:
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18 Item	19 Date Due
20 Compliance Due	21 August 6, 2009
22 Compliance Report and Index to the Record Due	23 August 17, 2009
24 Objections to a Finding of Compliance Due	25 August 31, 2009
26 Response to Objections Due	27 September 14, 2009
28 Compliance Hearing	29 September 22, 2009

30 Dated this 30th day of January, 2009.

31 _____
32 Holly Gadbow, Board Member

James McNamara, Board Member

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William H. Roehl, Board Member

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

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

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 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.

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