BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

FRIENDS OF SAN JUANS, LYNN BAHRYCH and JOE SYMONS, Petitioners, v. SAN JUAN COUNTY, Respondent.	No. 03-2-0003c **ORDER ON COUNTY'S MOTION REGARDING ORDINANCE 11-2006**

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

On August 11, 2006, Petitioners William Sherman, Lynn Bahrych, and Stephanie Johnson, filed their Memorandum in Support of San Juan County's Motion to Clarify and/or Modify Previous Orders of Invalidity and For Other Relief. No other party filed a response to the motion by August 19, 2006, the deadline for filing a response to the County's motion pursuant to WAC 242-02-534.

In this decision, the Board agrees with the County and Petitioners that the Board has no jurisdiction over Ordinance 11-2006 because this "Rules Ordinance" does not constitute a

[1] Motion to Clarify and/or Modify Previous Orders of Invalidity and For Other Relief, August 9, 2006
[2] *Ibid* at 1.

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

RELEVANT PROCEDURAL HISTORY

On November 30, 2000, the Board found that the provisions of the County's 2000 comprehensive plan amendments that allowed for new guest house construction in rural and resource lands failed to comply with the GMA and were invalid because the analysis of the impacts of detached ADUs continued to be inadequate. *Town of Friday Harbor, Fred R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San Juan County*, WWGMHB Case No. 99-2-0010c (Final Decision and Order, November 30, 2000).

On April 6, 2001, the Board issued an order clarifying the application of its imposition of invalidity in the November 30, 2000, Final Decision and Order. *Town of Friday Harbor, Fred R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San Juan County*, WWGMHB Case No. 99-2-0010c (Order Clarifying Invalidity, April 6, 2001). In that clarifying order the Board said:

> [w]e answer the County's question of whether the determination of invalidity also prohibits the issuance of a building permit for the construction of a principle (sic) residence if the property owners have previously constructed a guest house on the property in the negative. However, the previously constructed or permit- vested "guest house" must meet the definition of SCC 18.40.240. Otherwise the second residence would fall within the determination of invalidity issued on November 30, 2000.

Town of Friday Harbor, Fred R. Klein, John M. Campbell, and Lynn Bahrych, et al. v. San Juan County, WWGMHB Case No. 99-2-0010c, (Order Clarifying Invalidity, April 6, 2001) at 3.

On December 3, 2002, San Juan County adopted Ordinance 21-2002, which amended the regulations for the construction of ADUs. Later, this case became Case No. 03-2-0003c

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

In its Final Decision and Order on the consolidated case, the Board found the County's regulations that allowed ADUs in rural and resource lands to be noncompliant and invalid because it did not count a freestanding ADU as a unit of density in rural or resource lands. *Friends of San Juans, et al. v. San Juan County*, WWGMHB Case No. 03-2-0003c (Corrected Final Decision and Order, April 17, 2003).

On January 30, 2004, the County submitted a progress report to the Board. The report stated that the County has appealed the Superior Court decision and that the County is not accepting any applications for freestanding ADUs that do not conform to the Board's April 17, 2003, decision as modified by the Superior Court decision.

On June 30, 2004, the Board issued an order finding continuing noncompliance and invalidity and ordering the County to take official action to comply with the Board's April 17, 2003, order and to notify the public of that action.

On July 9, 2004, the Board received Petitioners' Motion for Clarification or Reconsideration. Petitioners alleged that the County is permitting a second single-family residence on lots in rural and resource lands that contain a single family dwelling unit of 1000 square feet or less. Therefore, Petitioners asked the Board to:

(1) direct the County immediately to discontinue its policy of permitting a second single-family dwelling unit on all lands with existing dwelling units smaller than 1000 square feet, and

(2) direct the County to amend its ordinance within a specific time period to bring its ordinances and policies into compliance with the GMA.

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On December 3, 2004, the Board found that Ordinance 21-2002 had not been amended and that the Board could no longer accept, pending resolution of the County's appeal to the courts, the County's "practice" of not issuing building permits that did not conform to the Board's order as interim compliance in lieu of amending its ordinance because now Petitioners dispute whether the County in fact is complying with this order when issuing building permits for ADUs. Order on Issues for Reconsideration (December 3, 2004). Therefore, the Board found Ordinance 21-2002 in continuing noncompliance and invalidity and ordered the County to bring that ordinance into compliance within 120 days.

The County adopted Ordinance 3-2005 on April 14, 2005. On July 21, 2005, the Board found that the regulations established by the new ordinance still substantially interfered with the RW 36.70A.020(2) and (8) because the regulations still did not require detached ADUs to meet the underlying density requirements. The Board also stated in that order that the Board's April 6, 2001, Order Clarifying Invalidity did not change the Board's Final Decision and Order of November 30, 2000, but merely explained that rights vested prior to the November 30, 2000, decision and order were unaffected by the imposition of invalidity in that order. Compliance Order (July 21, 2005).

On July 8, 2006, San Juan County adopted Ordinance 7-2006 that strictly limited the number of permits that could be issued for ADUs in a given year. On August 18, 2006, the Board found that these regulations no longer substantially interfered with RCW 36.70A. 020 (2) and (8) and rescinded invalidity. Order Lifting Invalidity.

On July 18, 2006, the County adopted Ordinance 11-2006. The County then filed a Motion to Clarify and/or Modify Previous Orders of Invalidity and For Other Relief on August 9, 2006. On August 11, 2006, Petitioners William Sherman, Lynn Bahrych, and Stephanie Johnson, filed a Memorandum in Support of San Juan County's Motion to Clarify and/or Modify Previous Orders of Invalidity and For Other Relief.

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ISSUE PRESENTED

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

DISCUSSION

Positions of the Parties

San Juan County argues that the Board does not have authority over Ordinance 11-2006 (Rules Ordinance) because it was not adopted pursuant to RCW 36.70A.040, but was adopted pursuant to RCW 19.27.095. The County declares that growth management hearings boards only have jurisdiction over comprehensive plans, development regulations or amendments to these GMA actions pursuant RCW 36.70A.280(1). The County explains that the intent of the Rules Ordinance is to establish that a principal residence is an "allowed use" on parcels that had a lawful accessory dwelling prior to November 2000. Because the County did not adopt the Rules Ordinance pursuant to RCW 36.70A.040, the County argues that it is not a GMA action and the Board should decline to exercise its jurisdiction.[3]

Citing RCW 36.70A.302, the County further contends that the Rules Ordinance is not subject to existing orders of invalidity because it pertains to applications for single-family residences. The County states that once the County has properly defined a detached accessory dwelling unit, the Board's previous orders of invalidity have no bearing on applications for single-family residences pursuant to RCW 36.70A.302(3)(b).[4]

In the alternative, if the Board finds it has jurisdiction over this Rules Ordinance, then the County maintains that the Rules Ordinance is compliant and that the prior order of invalidity

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[3] Memorandum in Support of Motions Regarding Ordinance 11-2006 at 6-7.
[4] Ibid at 7

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

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

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

Board Discussion

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

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[5] *Ibid* at 11.
[6] Ibid at 10.
[7] Memorandum in Support of San Juan County's Motion to Clarify and/or Modify Previous Orders of Invalidity and For Other Relief at 5.
[8] Ibid at 5.

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on properties that already have a lawfully established ADU. The vesting rules themselves have been adopted previously, according to the Rules Ordinance (Ordinance 11-2006, Section 1); so the purpose of the Rules Ordinance is to clarify the vesting of certain established rights to build principal residences. As we said in our July 21, 2005 order in this case: "The responsibility and authority for determining which permits were vested previous to the Board's April 6, 2001 Order does not rest with the Board." [9] The determination of whether specific rights have vested under County law is not within the Board's jurisdiction.

Secondly, we find that the Rules Ordinance did not establish or change a comprehensive plan policy or adopt or amend a development regulation. Therefore, because RCW 36.70A.280(1) only gives the Board jurisdiction over comprehensive plans, development regulations or other GMA actions and amendments to them, we find that the Board lacks jurisdiction over the Rules Ordinance.

CONCLUSION

The Rules Ordinance clarifies the extent to which rights vested under San Juan County rules to develop principal residences where lawful ADUs were already in place. The Ordinance is not a comprehensive plan or development regulation or does not amend a

[9] Compliance Order (July 21, 2005) at 19.

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

Dated this 29th day of August 2006.

_____
Holly Gadbaw, Board Member

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Margery Hite, Board Member

_____
Gayle Rothrock, Board Member

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

<u>Reconsideration</u>. 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 to all other parties of record. <u>Filing means actual receipt of the document at the Board office.</u> 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.

<u>Judicial Review</u>. 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 <u>actual receipt of the document at the Board office</u> 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.

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

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