

No. 39071-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

BRINNON GROUP and BRINNON MPR OPPOSITION,

Appellants,

v.

**JEFFERSON COUNTY, STATESMAN GROUP OF COMPANIES,
LTD, et al.,**

Respondents.

RESPONSE BRIEF

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
02 DEC 21 PM 2:19
BY *[Signature]*
DEPUTY

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I. INTRODUCTION

Jefferson County Ordinance No. 01-0128-8 ("Ordinance") amended the Jefferson County Comprehensive Plan ("JCCP") by designating a 256-acre site as a Master Planned Resort ("MPR"). The Appellants Brinnon Group and Brinnon MPR Opposition ("Appellants" or "Brinnon") challenged the Ordinance by filing a Petition for Review pursuant to the Growth Management Act, chapter 36.70A RCW, with the Western Washington Growth Management Hearings Board ("WWGMHB"), and by filing a Complaint for Constitutional Writ of Certiorari and Statutory Writ of Review in Clallam County Superior Court.

After reviewing the testimony and exhibits and considering the merits of Appellants' appeal, the WWGMHB denied Appellants' Petition for Review. Appellants appealed that decision to the Thurston County Superior Court, which affirmed the WWGMHB decision. The Clallam County Superior Court refused to issue the requested writs and dismissed Appellants' Complaint because Appellants had an adequate remedy law before the WWGMHB.

This is a consolidated appeal from the decision of the WWGMHB as affirmed by the Thurston County Superior Court, as well as the decision of the Clallam County Superior Court dismissing Appellants' Complaint.

Appellants have failed to carry their burden to demonstrate that the WWGMHB decision is erroneous, and that the Clallam County Superior Court abused its discretion when it refused to issue the requested writs and dismissed the Complaint.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the WWGMHB err in concluding that Appellants failed to meet their burden of demonstrating that the Ordinance failed to comply with the provisions of the Planning Enabling Act, chapter 36.70 RCW, the Growth Management Act, chapter 36.70A RCW, and the State Environmental Policy Act, chapter 43.21C RCW?
2. Did the Clallam County Superior Court abuse its discretion by dismissing Appellants' Verified Complaint for Constitutional Writ of Certiorari and Writ of Review (the "Complaint") where the Complaint alleged violations of the Planning Enabling Act ("PEA") that Appellants had also asserted before the WWGMHB?

III. COUNTERSTATEMENT OF THE CASE¹

A. The Ordinance Reflects Over Seven Years of Public Review and Planning for an MPR in the Brinnon Area.

On January 28, 2008, the Jefferson County Board of County Commissioners ("BOCC") approved Ordinance No. 08-0128-8

¹ Respondents follow the abbreviations to the record used by Appellants. Administrative Record ("AR"); Thurston County Clerk's Papers ("TCCP"); and Clallam County Clerk's Papers ("CCCP"). Appellants' Opening Brief is referred to as "Brief".

("Ordinance"). The Ordinance amended the Jefferson County Comprehensive Plan ("JCCP") by designating 256 acres near unincorporated Brinnon as a Master Planned Resort ("MPR") pursuant to the Growth Management Act ("GMA"), chapter 36.70A RCW.²

The Ordinance is the culmination of over seven years of public review and planning for an MPR designation in this part of Jefferson County. In 2002, well before the events giving rise to the present appeal, Jefferson County identified approximately 305 acres (including the 256 designated by the Ordinance as an MPR) as appropriate for a future MPR in the Brinnon Subarea Plan ("BSAP").³ (AR 00191-00206). The BOCC concluded that the 305 acres located near Brinnon already contained many of the statutorily required features for an MPR designation,⁴ and that an

² The GMA directs counties to plan for future growth by, among other things, focusing urban growth in designated urban growth areas to reduce sprawl. RCW 36.70A.020. An MPR is a GMA planning tool that permits urban growth outside of designated urban growth areas in certain circumstances. RCW 36.70A.360.

³ A subarea plan is an optional planning tool that permits planning jurisdictions to adopt comprehensive planning policies for specific areas or neighborhoods. RCW 36.70A.080.

⁴ Under the GMA, a county may authorize an MPR only if the following criteria are satisfied:

- (a) The comprehensive plan specifically identifies policies to guide the development of master planned resorts;
- (b) The comprehensive plan and development regulations include restrictions that preclude new urban or suburban land uses in the vicinity of the master planned resort, except in areas otherwise designated for urban growth under RCW 36.70A.110;
- (c) The county includes a finding as a part of the approval process that the land is better suited, and has more long-term importance, for the master planned resort than for the commercial harvesting of timber or agricultural production, if located on land that otherwise would be designated as forest land or agricultural land under RCW 36.70A.170;
- (d) The county ensures that the resort plan is consistent with the development regulations established for critical areas; and

MPR designation in this part of the County "would help boost local economic activity and more effectively serve tourist needs in this part of the County." (AR 00196). The BSAP expresses a vision of an MPR in this area. Actual designation of an MPR, however, could only be accomplished through a site-specific application. (AR 000197). The BSAP notes that any site-specific MPR must be reviewed for consistency with the vision for an MPR set forth in the BSAP. (AR 00198).

The Statesman Group of Companies filed a site-specific application for an MPR in the Brinnon area on March 1, 2006. (AR 001489-001525).

B. The Statesman Application Is the First Phase of a Five-Phase Process and Only Addresses Whether the Size and Scope of the Proposed MPR Is Consistent with the BSAP.

The County decided to assess the Statesman proposal through a five-phase review process. The five phases can be further categorized into two non-project level phases (Phases 1 and 2) and three project level review phases (Phases 3, 4 & 5). (AR 001649). The present appeal deals with Phase 1, which is limited to determining whether the size and scope of the proposal is generally consistent with the BSAP. Subsequent zoning

(e) On-site and off-site infrastructure and service impacts are fully considered and mitigated.
RCW 36.70A.360 (3). Appellants do not contend that the MPR fails to meet these criteria.

changes to implement the MPR designation and the negotiation of development agreements will take place during Phase 2.

C. Statesman's Application for a Site-Specific MPR Designation Included a Text Amendment and Map Amendment.

Statesman's initial application requested that the JCCP be amended to designate approximately 251 acres as a 1,270-unit MPR. (AR 001489-001525). The application material included a map of the proposed MPR boundary, as well as a proposed text amendment. (AR 001517 (text), 001512 (map)).

Over the following 18 months the applicant met with members of the community, the County, and affected tribes to discuss and refine its proposal to better achieve the goals and vision of the community set forth in the JCCP and BSAP. Through this process a number of revisions to the proposal were made including, but not limited to, eliminating property west of US 101 from the proposed MPR boundary and reducing the number of proposed units from 1,270 to 890.

The revisions to the application were reflected in the Draft Environmental Impact Statement ("DEIS"), which was made publicly available on September 5, 2007, one month before the Planning Commission hearing, seven weeks before the deadline for public comment to the Planning Commission, two months before the County

Commissioner hearing and nearly four months before the Ordinance was adopted. (AR 001696-001753). The project as finally proposed for public hearing before the planning commission was detailed in the DEIS under Chapter 1, "THE PROPOSAL." (AR 001712-001728). The DEIS included a map of the proposed MPR boundary (AR 001715) in addition to more detailed maps of the specific portions of the proposed MPR (AR 001716, 001722, 001724).

The boundaries of the map ultimately adopted by the BOCC in the Ordinance are identical to the map identified in the DEIS.⁵ (*Compare* AR 001647 *with* AR 001715). Similarly, the text amendment approved by the BOCC captures the substance of the proposal as described in the DEIS. (*Compare* AR 001638 *with* AR 001728).

D. The MPR Proposal Set Forth in the DEIS Was Subject to Exhaustive Public Scrutiny.

The "formal" public involvement on this proposal commenced once the DEIS was published. The DEIS was issued with a 45-day comment period that ended on the close of business on October 24, 2007. During that time the County held three public workshops where the proposed MPR was discussed (September 11, 18 and 25, 2007) (AR

⁵ Appellants criticize the map amendment adopted by the BOCC because it included the DNR lease land as well as the Voetberg, Dowd and Stevens properties located northeast of the marina. (Brief at 42-43). Notably, the proposed map available for public review included the DNR lease lands and did not include the properly owned by Voetberg, Dowd and Stevens located on the uplands northeast of the marina. (AR 001724).

00940-00942) and held a public hearing before the Planning Commission on October 3, 2007 (AR 00953-0000957). Members of the public had the ability to present their comments orally or in writing. The County received approximately 400 comments on the DEIS during this comment period—a testament to the County’s efforts to notify and inform the public of this proposal. The comments were roughly divided between those expressing support for the proposal and those expressing opposition. (AR 00966-977).

After the public comment period closed, the County held additional Planning Commission workshops (October 31, November 7, November 14, 2007) to consider the proposal, the public comments and the criteria for approving MPRs (AR 00958-00965). The Planning Commission completed its recommendations on November 20, 2007 and formalized its recommendation on November 28, 2007.⁶ The Planning Commission recommended approval of designating the MPR proposal evaluated in the DEIS:

This proposed MPR rezone of 256 acres on Black Point in Brinnon would create 890 units of permanent and transient housing, an 18 hole golf course, and commercial space along the marina and golf course.

⁶ The Planning Commission recommendation became available on November 28, 2007. Appellants assert that it was not available until December 3, 2007. (Brief at 20-21). Appellants point to no evidence in the record to support this statement except for their own conclusory remarks.

....

After extensive review of the criteria needed to make the decision and whether or not the proposal was consistent with the [JCCP], the Planning Commission found that the proposal is consistent with the Comprehensive Plan and voted (7-2) to recommend approval of the proposal.

(AR 001550-001554; 001565) (emphasis added). The only “proposal” up for consideration was “the Proposal,” described in Chapter 1 of the DEIS. (AR 001712-001728).

The BOCC held its public hearing on the proposed amendment on December 3, 2007. Due to severe weather the County continued the hearing until December 6, 2007 and left the comment period open until noon on the following day to insure that all citizens interested in commenting on the Planning Commission's recommendation had the opportunity to do so. Notice of the extension was posted on the billboard outside of the Superior Courtroom. (TCCP 126). Appellants, through their attorney, submitted comments by the close of the comment period. (AR 000389).

E. The Ordinance Passed by the BOCC Is Only the First Phase of a Five-Phase Review That Must Occur Before Building Permits Are Issued.

The BOCC held work sessions on January 7 and 14, in which they addressed the benefits of the project and the need for significant protection

to assure that the vision is properly realized. (AR 001608, 001613). The Ordinance (AR 000979-000995), adopted January 28, 2008, amended the County Comprehensive Plan by designating the Pleasant Harbor MPR within the previously designated Black Point MPR identified in the BSAP.

Notably, the amendment of the Comprehensive Plan is only the first of five phases of review. (AR 001649). This first phase, which is the phase at issue in this appeal, is only concerned with a fairly narrow determination: whether the location, size and scale of the Pleasant Harbor “Proposal” were consistent with the vision outlined in the BSAP. (AR 001649-0011659). Before actual development may begin, the County and the applicant must complete additional phases. (*Id.*) For instance, a zoning ordinance must still be adopted and a development agreement must be negotiated with the applicant to provide the development regulations necessary to implement the MPR envisioned in the proposal. (AR 001007). The actions taken during the subsequent phases are subject to further review, public comment and scrutiny (AR 000984, finding 36).

Since the BOCC was only faced with the first phase of the decision, it removed the land use designations on the Planning Commission map. (*Compare* AR 001554 (Planning Commission map) *with* AR 001647 (BOCC map)). This alteration is consistent with Jefferson County's decision to phase the review of the MPR and preserve

zoning-related issues for Phase 2. In fact, the planning agency recommended during the public hearing that the BOCC alter the land use map proposed by the Planning Commission to become one color. (AR 001651).

Similarly, the BOCC corrected technical errors with the Planning Commission map. The BOCC added the DNR tidelands to be consistent with the proposal as assessed in the DEIS and removed the Voetberg, Dowd and Stevens properties located on the uplands northeast of the marina because those properties were not included as part of the Proposal assessed in the DEIS. (*Compare* AR 001554 (Planning Commission map) *with* AR 001715, 001724 (DEIS map) *with* AR 001647 (BOCC map)).⁷

F. Petitioners Participated in the MPR Designation.

Although Appellants' Statement of Facts repeatedly refers to their inability to effectively participate, the record is clear that Appellants actively participated in the public process and were fully aware of the size and scope of the MPR that was proposed and ultimately approved by the BOCC. Counsel for the Appellants submitted detailed comments on the material elements of the proposal at the hearing before the Planning Commission and the BOCC (Counsel for Appellants submitted letters

⁷ Including the Voetberg, Dowd and Stevens properties in the MPR designation was assessed as an alternative to the proposal. Yet, those property owners had not applied to include their property in the MPR designation. As a result, it was a technical error for the Planning Commission to include those properties in their recommended map.

dated October 24, 2007, December 6 and 7, 2007, January 8, 11, and 14, 2008) (AR 000293-296; 000310-312; 000389-393; 000401-000404; 000409-412; 000414-415). Appellants commented on the text amendment proposed by the applicant and specifically commented that “the project should be downsized from 890 units.” (AR 000293). Appellants also commented on other issues including the propriety of a marina and golf course as well as visibility, open space, stormwater controls and traffic. (See, e.g. AR 000293-000296.) These and other comments demonstrate that Appellants were well aware of the scope of the proposal and also that they had the ability to comment on what they perceived as deficiencies with the proposal.

G. The Appellants' Challenged the Ordinance in Two Forums.

After the BOCC passed the Ordinance, Brinnon challenged the Ordinance by filing a Compliant for a Constitutional Writ of Certiorari and Statutory Writ of Review in Clallam County Superior Court ("Clallam County Complaint"). Brinnon concurrently filed a Petition for Review before the WWGMHB (or "Growth Board"). Neither action asserted that the MPR designation failed to satisfy the statutory criteria for approval of an MPR, or that the MPR was not consistent with the JCCP or the BSAP. Rather, both actions focused primarily on alleged procedural and technical irregularities with how the amendment was processed.

On February 18, 2008, Appellants filed a Verified Complaint for Constitutional Writ of Certiorari and Statutory Writ of Review in Clallam County Superior Court. Appellants generally alleged that the Ordinance violated the provisions of the PEA, chapter 36.70 RCW.

More specifically, the Complaint alleged three basic violations of the PEA:

- The Planning Commission did not incorporate findings of fact in violation of RCW 36.70.400 (¶7.2.1);
- The Planning Commission did not expressly identify the map change or the text that it recommended for approval in violation of RCW 36.70.400 (¶¶7.2.2-7.2.15); and
- The BOCC did not remand the matter back to the Planning Commission in violation of RCW 36.70.420 and .430 (¶¶7.2.16-7.2.27).

(CCCP 309-313). Appellants' Complaint also admitted that it had to pursue an appeal to the WWGMHB before it could seek relief from the Clallam County Superior Court:

The Brinnon Group and Brinnon MPR
Opposition respectfully request that this
Court issue a constitutional writ of review

pursuant to Washington State Constitution, Art. IV, Sec. 6 upon the request of Plaintiffs commanding Jefferson County to return the record specified in the writ to the Court and upon the request of Plaintiffs, setting a briefing schedule and holding a hearing on the merits to determine if Ordinance No. 01-0128-08 is contrary to law and therefore should be voided. The Plaintiffs intend to proceed with these requests after the Western Growth Board has ruled on appeals within their jurisdiction challenging the Ordinance.

(CCCP 317) (emphasis added).

One month after filing the Complaint in Clallam County Superior Court the Appellants filed a Petition for Review with the WWGMHB.⁸ (AR 00001-00030). On April 29, 2008, the WWGMHB issued a Pre-Hearing Order. (AR 000117). The first issue before the Board captured the same PEA issues raised in the Clallam County Complaint:

1. Whether the adoption of the Ordinance was in compliance with the public participation provisions under the GMA . . . regarding ineffective and/or untimely notice and lack of effective opportunity for public comment all both for [Comprehensive Plan] text, map amendment, and conditions all both before the Planning Commission and the BOCC; for inadequate Planning Commission Findings, Conclusions, and Recommendations not allowing preparation

⁸ The Appellants were designated as the "Petitioners" in the proceedings before the WWGMHB. For ease of identification Respondent refers to them as the Appellants in this brief.

for BOCC hearing; for not having Planning Commission recommendations timely available before BOCC public hearing; for not having timely Planning Commission signed map and text sufficiently before BOCC public hearing; for considering amendments to Richards' property and DNR lease that were not docketed; for inadequate BOCC Findings and Conclusions, for allowing email comments without notice that ensures knowledge if comments were received?

(AR 000117). To the extent that there was any ambiguity with respect to whether this issue encompassed the PEA issues, it was resolved in

Appellants' Pre-Hearing Brief to the Growth Board:

Conforming with the relevant portions of RCW 36.70 RCW is part of the County's public participation program and pursuant to RCW 36.70A.140, the County must comply with the spirit of the program. RCW 36.70.430 . . . states if the BOCC wants to change the Planning Commission recommendation

(AR 00167). This is precisely the same issue that Appellants set forth in the Clallam County Complaint in paragraphs 7.2.16 through 7.2.27.

(CCCP 309-313).

Similarly, Appellants also noted the alleged failure of the Planning Commission to include findings of fact, as it also asserted in paragraph

7.2.1 in the Complaint. (AR 000174).⁹ Finally, Appellants noted the Planning Commission's alleged failure to properly refer to the maps and text that would constitute the amendment as set forth in paragraphs 7.2.2 through 7.21.5 of the Clallam County Complaint. (AR 000175).

Based on these filings, Respondent moved to dismiss Appellants' Complaint. (CCCP 185). Respondent argued that the Court could not issue the writs because Appellants had another adequate remedy at law to pursue the alleged PEA violations. In fact, Appellants were pursuing the same violations before the WWGMHB. (CCCP 190-194).

While the Motion to Dismiss the Clallam County Complaint was pending, the WWGMHB denied the Appellants Petition for Review and affirmed all of the County's actions, including the challenges to the process under RCW 36.70. (AR 002647-002649). The September 15, 2008 WWGMHB Final Decision and Order ("FDO") ruled that although it does not typically have jurisdiction over PEA issues, that it would assert jurisdiction in this case because the County had incorporated the PEA into its GMA public participation program. (AR 002613). The WWGMHB concluded that the County fulfilled its obligations under the Planning Enabling Act, Growth Management Act and State Environmental Policy

⁹ The Growth Board concluded that the Planning Commission made the requisite findings and substantially complied the Jefferson County Code. (AR 002623). Appellants have not assigned error to that finding and therefore it is a verity on appeal.

Act. (AR 002647-002649). The Growth Board's specific ruling on the merits of the Appellant's PEA claims before the Superior Court in the writ proceeding further supported the argument that Appellants in fact had their day in court and an adequate remedy outside of the writ process.

On December 17, 2008 the Clallam County Superior Court concluded that the Growth Board had provided an adequate remedy at law and refused to issue the requested writs. The decision squarely addressed Appellants' argument that the writ process is the only remedy available to void the Ordinance:

According to RCW 36.78.300[sic], if the GMHB finds noncompliance, it shall remand that matter to the county, which must then correct the error and comply with the requirements of the GMA. The Board's finding of noncompliance may also contain a determination that the ordinance or regulation, or parts thereof, are invalid. Such a finding of invalidity prevents the operational application of the ordinance or regulation during the period of remand.

(CCCP 24) (internal citations omitted). The court went on to note that:

While the requested relief may not be identical, i.e. invalidity versus void, the substantive relief available to Plaintiffs on appeal of the Hearings Board's decision is essentially the same as that available through the writ process.

(CCCP 25). Appellants subsequently appealed this decision which was consolidated with Appellants appeal of the Thurston County Superior Court's decision affirming the WWGMHB's decision.

IV. ARGUMENT¹⁰

A. **The Growth Board Did Not Err When It Rejected Appellants' Arguments and Concluded that Ordinance No. 08-0128-8 complied with the PEA and the GMA.**

The GMA was enacted in 1990¹¹ to address the threats posed by uncoordinated growth:

uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.

RCW 36.70A.010. To address this concern the GMA requires that communities adopt comprehensive plans and development regulations that meet GMA standards. RCW 36.70A.040.

In 1991, the legislature created the growth management hearings boards as the enforcement mechanism for the GMA. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 548, 958

¹⁰ Appellants assign 45 individual errors to the decisions before the Court. Many of those errors, even if correct, do not in themselves or together warrant reversal. An error does not warrant reversal unless there is a substantial likelihood that it affected the decision. *See Carnation Co. v. Hill*, 115 Wn.2d 184, 796 P.2d 416 (1990).

¹¹ LAWS OF 1990, 1st Ex. Sess., ch. 17.

P.2d 962 (1998). These boards have jurisdiction to invalidate all or part of comprehensive plans or development regulations that substantially fail to comply with the goals of the GMA. *Id.* at 549; RCW 36.70A.280(1)(a)–302.

1. Standard of Review.

Judicial review of the Growth Board's decision is governed by the Administrative Procedure Act ("APA"), chapter 34.05 RCW. The APA establishes nine bases upon which the Board's decision may be appealed. RCW 34.05.570(3)(a)-(i). Of the nine bases the only two are at issue here:

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

Id. The Court sits in the same position as the superior court, applying APA standards directly to the record created before the BOCC. The Appellants bear the burden of demonstrating that the Growth Board erred in reaching its decision. RCW 34.05.570(1)(a).

In assessing whether the Growth Board erred the Court must keep in mind the Legislature's directive that comprehensive plan amendments are presumed valid upon adoption. RCW 36.70A.320(1). The Growth

Board shall find a comprehensive plan in compliance with the GMA unless it finds by a preponderance of the evidence that the county erroneously interpreted or applied GMA provisions. RCW 34.05.320(3).

2. The Growth Board Properly Concluded that Jefferson County Complied with the Public Participation Provisions of the GMA including the PEA.

Appellants argue that the Growth Board erred in finding that Jefferson County complied with its public participation program required by the GMA including provisions of the PEA, chapter 36.70 RCW. (Opening Brief 6-11, 37-44). More specifically, Appellants arguments are reduced to two perceived errors: (1) that the Jefferson County Planning Commission ("Planning Commission") did not recommend approval of a text or map amendment in violation of RCW 36.70.400; and (2) the BOCC changed the Planning Commission's Recommendation by adopting a text amendment and approving a map that corrected the technical errors in the map that had been approved by the Planning Commission without remanding the changes to the Planning Commission for additional public hearings. RCW 36.70.430-.440.

a. RCW 36.70.400 Does Not Require That the Exact Wording of the Text Amendment Be Included in the Planning Commission's Recommendation.

Statutes are construed in accordance with their plain meaning. *State v. Chapman*, 140 Wn.2d 436, 450, 998 P.2d 282 (2000). Under the

PEA, the Planning Commission is only required to approve a description of the matter intended to constitute the plan or amendment:

The approval of the comprehensive plan, or of any amendment, extension or addition thereto, shall be by the affirmative vote of not less than a majority of the total members of the commission. Such approval shall be by a recorded motion which shall incorporate the findings of fact of the commission and the reasons for its action and the motion shall refer expressly to the maps, descriptive, and other matters intended by the commission to constitute the plan or amendment, addition or extension thereto. The indication of approval by the commission shall be recorded on the map and descriptive matter by the signatures of the chair and the secretary of the commission and of such others as the commission in its rules may designate.

RCW 36.70.400 (emphasis added). Appellants' argument improperly equates the phrase "descriptive matter" with an exact text amendment. (Brief at 38). In doing so, Appellants add language to the section that simply does not exist. The language of RCW 36.70.400 is unequivocal; the Legislature did not require that the Planning Commission approve or recommend the exact text. Rather, the Legislature only required that the Planning Commission signify its approval of a general description of the matter that constitutes the plan or amendment.

Here the Planning Commission's Recommendation did refer to the descriptive matter that the commission intended to constitute the proposed amendment in two places. After conducting a public hearing, the Planning Commission, by a 7-2 vote, approved "the proposal." The only proposal before the Planning Commission was the proposal defined in the DEIS. (AR 00923). The DEIS summarizes that the proposal will encompass 256 acres (plus 15 acres of tidelands), contain 890 residential units, include a golf course, marina and associated resort facilities. (AR 001728).

In addition to referencing the proposal in the DEIS, the Planning Commission Recommendation also includes a summary of the descriptive matter of the proposal recommended for approval:

MPR rezone of 256 acres on Black Point in Brinnon [that] would create 890 units of permanent and transient housing, an 18 hole golf course, and commercial space along the marina and at the golf course.

(AR 001567). This description sufficiently described the proposal constituting the amendment.

Appellants stress, albeit in a footnote, that the precise text amendment must be approved by the PC to avoid any confusion between the BOCC and PC.¹² Even if that were the case, which it is not, Appellants have not demonstrated that the BOCC was confused with

¹² Brief at 7, fn. 41.

respect to the Planning Commission's recommendation. In fact, the BOCC Ordinance incorporates all of the material items discussed in the DEIS and the Planning Commission summary:

Early in 2008, Jefferson County designated a new Master Planned Resort (MPR) in Brinnon. The new Master Planned Resort is 256 acres in size and includes the Pleasant Harbor and Black Point areas. The Marina area is existing and would be further developed to include additional commercial and residential uses such as townhouses and villas. The Black Point areas of the new resort would include new facilities such as a golf course, a restaurant, a resort center, and a community center. The overall residential construction would not exceed 890 total units.

(AR 001638). Appellants do not contend that the Planning Commission or the public lacked an opportunity to consider or comment on any material element of this text of the amendment.

Even assuming that RCW 36.70.400 requires that the exact text amendment must be approved by the Planning Commission, Appellants argument still fails. In adopting the GMA the Legislature expressly placed substance over procedure. It declared that errors in exact compliance do not warrant invalidation. RCW 36.70A.140. Even if this Court were to conclude that the Growth Board's interpretation of RCW 36.70.400 is

erroneous, the error is one of exact compliance and does not warrant reversal.

b. The BOCC Was Not Required to Remand the Matter Back to the Planning Commission.

Appellants next contend that the BOCC improperly changed the Planning Commission's recommendation by adopting a text amendment and making minor corrections to the map amendment without properly referring the changes back to the Planning Commission in violation of RCW 36.70.430, which provides:

When it deems it to be for the public interest, or when it considers a change in the recommendations of the planning agency to be necessary, the board may initiate consideration of a comprehensive plan, or any element or part thereof, or any change in or addition to such plan or recommendation. The board shall first refer the proposed plan, change or addition to the planning agency for a report and recommendation. Before making a report and recommendation, the commission shall hold at least one public hearing on the proposed plan, change or addition. Notice of the time and place and purpose of the hearing shall be given by one publication in a newspaper of general circulation in the county and in the official gazette, if any, of the county, at least ten days before the hearing.

The section applies when the Legislative body desires to "initiate" a consideration of a change, not in the final review of a recommendation thoroughly reviewed by a planning commission. When taken to its logical

conclusion, Appellants reading would prevent the county commissioners from changing the punctuation, correcting a spelling error, or recording the findings in making a final decision even though the change had no material affect on the recommendation. Clearly, the Legislature did not intend with the language quoted that every change be remanded back to the Planning Commission for further consideration.¹³ *See Killian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) (noting that courts should avoid constructions that yield absurd or strained consequences).

Nevertheless, the full and complete answer to Appellants' argument on this matter is answered by the Growth Management Act itself. The PEA, Chapter 36.70RCW and the GMA Chapter 36.70A RCW are building blocks in the legislative program for county land use actions. As two statutes addressing the same topic, courts must construe them together to create a total statutory scheme. *Hallauer v. Spectrum Properties, Inc.* 143 Wn.2d 126, 146, 18 P.3d 540 (2001). The PEA, adopted in 1967, describes a process and an agency by which planning recommendations are made to the county commissioners. The GMA, passed nearly 25 years later, clarified the roles of legislative bodies and

¹³ Even Appellants tacitly recognize the fallacy in arguing that every change must be remanded back to the Planning Commission for further public hearings by couching their grievances as "substantial changes." *See*, e.g. Brief at 42. Yet, the changes are not substantial because they did materially effect the recommendation which was to approve and MPR designation on 256 acres with conditions. The BOCC followed the Planning Commission Recommendation.

their subordinate planning agencies when it comes to comprehensive plan amendments addressing GMA related topics:

(2)(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation, and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.

(b) An additional opportunity for public review and comment is not required under (a) of this subsection if:

(i) An environmental impact statement has been prepared under chapter 43.21C RCW for the pending resolution or ordinance and the proposed change is within the range of alternatives considered in the environmental impact statement;

(ii) The proposed change is within the scope of the alternatives available for public comment;

(iii) The proposed change only corrects typographical errors, corrects cross-references, makes address or name changes, or clarifies language of a proposed ordinance or resolution without changing its effect;

(iv) The proposed change is to a resolution or ordinance making a capital budget

decision as provided in RCW 36.70A.120;
or

(v) The proposed change is to a resolution or ordinance enacting a moratorium or interim control adopted under RCW 36.70A.390.

RCW 36.70A.035(2)(b)(1) (emphasis added). This provision plainly demonstrates that Legislature did not intend to hold up comprehensive planning with the trappings of procedure for procedure's sake.

In this case, the "changes" cited by the Appellants did not affect the substance of the proposal, but even if they did, the changes were plainly contemplated in the FEIS. Appellants' argument that any substantive change requires a remand to the planning commission under the facts of this case must necessarily fail. Referring matter to the planning commission, under RCW 36.70.430 requires additional public hearings, and such result either ignores or renders superfluous the language in RCW 36.70A.035(2)(b)(1) that no additional hearings are required when the changes are covered in an EIS. Appellants did not argue to the Board below or to this court that the changes complained of were outside the scope of the FEIS. And without such a showing the argument fails and claim must necessarily be dismissed.

Appellants argue that the BOCC changed the Planning Commission recommendation by adopting a text amendment. As stated above, the PEA does not require that a planning commission provide the

precise text; it only requires that the planning commission approve the descriptive matter. The text amendment adopted by the BOCC is within the parameters of the project description approved by the Planning Commission and squarely within the description of the proposals provided in the EIS. Appellants have not demonstrated otherwise. Rather, the Appellants complain of a number of unspecified errors with the text that could take up a whole brief (Brief at 42), yet they choose to pursue hyper-technical procedural violations rather than the substantive violations that they allege exist.

Similarly, the BOCC did not materially change the map amendment approved by the Planning Commission. Appellants cite to the removal of land from the MPR designation,¹⁴ the removal of the land use districts and the deletion of the language referencing the seven conditions in the top left-hand corner. (Brief 9, fn 43).¹⁵ These changes were all technical corrections that did not materially impact the proposal recommended for approval.

The removal of land from the MPR designation corrected a technical error in the Planning Commission's recommendation. The properties referenced by Appellants are located in the northern tip of the

¹⁴ It is indicative of the appeal that Appellants, who are opposed to the MPR, would actually appeal a decision made by the BOCC to reduce the size of the MPR.

¹⁵ The remaining issues address differences between the map adopted by the BOCC and the maps in the FEIS.

MPR boundary. Those properties were never part of the proposal assessed in the EIS. (AR 001478, Ins 14-16). Likewise, the tidelands were also plainly part of the proposal that was before the Planning Commission. The Planning Commission specifically approved the proposal described in the DEIS which included of the marina, but did not make any findings that would suggest that it intended to exclude the tidelands that make up the marina. Regardless, both the public and Planning Commission had adequate opportunity to consider the inclusion of the tidelands in the MPR boundary, and the BOCC is entitled to alter the map to include the tidelands. Finally, Appellants cry foul because the BOCC removed the caption at the top right-hand corner of the Planning Commission map that referenced the conditions. Yet, the BOCC adopted every condition recommended by the Planning Commission in the Ordinance.¹⁶

3. Appellants Have Not Demonstrated that the Growth Board Erred When it Found that Appellants Had Not Demonstrated Any Inconsistency in the BSAP Associated with Map BR-3.

Appellants assert that the amendment must be invalidated because it failed to amend the BSAP when it adopted the Statesman proposal. The argument lacks merit.

¹⁶ The conditions to the approval recommended by the Planning Commission are found in the Ordinance at 63a, 63c, 63f, 63d, 63j, 63s and 63n-r. (AR 000988-991).

The Growth Board has routinely interpreted the GMA requirement for internal consistency in terms of compatibility:

[I]t should be noted that not every area of vagueness or ambiguity in a comprehensive plan rises to the level of an internal consistency within the meaning of the preamble of RCW 36.70A.070. Consistency means that no feature of the plan or regulation is incompatible with any other feature of the plan or regulation: no feature of the one plan may preclude achievement of any other feature of that plan or any other plan.

(AR 002626); *see also Camp Nooksack Assoc. v. City of Nooksack*, WWGMHB No. 03-2-0002 (FDO 7-11-03). This interpretation is entitled to deference. Appellants have not demonstrated that the BSAP is incompatible with the amendment.

The BSAP shows where an MPR could be located. The amendment simply identifies that the Statesman Proposal is appropriate in size and scale for a portion of the property that the BSAP identifies as potential MPR land. There is no inconsistency between the two.

Assuming for the sake of argument that the BSAP needs to be amended, Appellants point to prejudice or harm that they would now suffer if the BSAP were amended at a later date. As noted earlier, the Ordinance addressed the first stage of a five-stage review process. The

second phase of review addresses the imposition of zoning regulations and could also address amending the BSAP.

4. Appellants Have Not Demonstrated that the Growth Board Erred in Concluding that the JCCP had Sufficient Building Intensities.

Appellants ask the Court to reverse the Growth Board's decision because the amendment did not limit non residential building intensities. In doing so, the Appellants misstate the Growth Board's conclusion by indicating that the Growth Board only relied upon the multi-step approval process to further implement the parameters of the MPR. (Brief at 46). To the contrary, the Growth Board also relied upon existing building goals and policies in the JCCP that limit the intensities of buildings. (AR 002633).

Appellants understandably omit this important and independent basis for the Growth Board decision because Appellants themselves admitted in front of the Thurston County Superior Court that the land use element of the JCCP, specifically LNP 24.6, addressed building intensities. (TCCP 106, lns. 23-24). Moreover, as Respondents pointed out before the Growth Board and Thurston County Superior Court, the JCCP actually contains a number of policies aimed at limiting the intensity

of both residential and non-residential buildings.¹⁷ For instance, LNP 24.1 recognizes that MPRs allow for urban intensities (AR 00897-00898); LNP 24.5 requires that buildings in the MPR should consist of predominantly short-term visitor accommodations; and LNP 24.9 requires that facilities blend into the nature environment (AR 00899). The text amendment itself limits residential density to 890 units. (AR 000994).

B. The Growth Board Properly Concluded that the County Complied with SEPA.

1. SEPA and Standard of Review.

The State Environmental Policy Act ("SEPA"), chapter 43.21C RCW, was enacted in 1971 to "promote the policy of fully informed decision making by government bodies when undertaking 'major actions significantly affecting the quality of the environment.'" *Moss v. Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001) (citation omitted). SEPA does not demand any particular substantive result in governmental decision making. *Moss*, 109 Wn.App. at 14; *see also Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973). In essence, what SEPA requires is that the "presently unquantified environmental amenities and values will be given appropriate consideration in decision making

¹⁷ The JCCP is also available on line at:
<http://www.co.jefferson.wa.us/commdevelopment/CompPlanGeneral.htm>
The County's building intensities are located in Chapter 3 "Land Use and Rural Element".

along with economic and technical considerations." RCW

43.21C.030(2)(b).

An environmental impact statement ("EIS") is required for proposals for legislation and other major actions having a probable significant, adverse environmental impact. RCW 43.21C.031. To further achieve SEPA's goals every EIS must contain:

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

RCW 43.21C.030(c) (emphasis added). "[A]n EIS is not a compendium of every conceivable effect or alternative to a proposed project, but is simply an aid to the decision making process." *Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 641, 860 P.2d 390 (1993) (quoting Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 14(a)(i) (4th ed. 1993)).

Challenges to the adequacy of an EIS are reviewed under the rule of reason. *Id.* at 627. . Under this rule, an EIS must be upheld if it presents decision-makers with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the agency's decision. *Citizens*, 122 Wn.2d at 633 (internal quotation marks and citation omitted).

The adequacy of an EIS is subject to de novo review. However, agency determination of adequacy "shall be accorded substantial weight." RCW 43.21C.090.

2. The Growth Board Properly Concluded that Appellants Failed to Demonstrate that the Alternatives Analyzed in the EIS Are Inadequate.

An EIS must include a description of the present proposal as well as alternative courses of action. WAC 197-11-440(5). The SEPA rules define "reasonable alternatives" as "actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." WAC 197-11-440(5)(b). The Growth Board concluded that the Appellants failed to meet their burden of demonstrating that the alternatives were inadequate:

Petitioners' rather brief (four line) argument on this point provided no factual argument to demonstrate that the County failed to consider an alternative that achieved the proposal's objective at a lower

environmental cost except to point to the statement in the Summary of the DEIS that the alternatives have 'similar impacts since the bulk of the property is put to resort uses.'

(AR 002638).

Appellants seem to assert that the alternatives requirement demands an alternative that has a smaller footprint:

Because both alternatives allow the Statesman proposal inside the project boundaries and then allow increased development outside the project boundaries, neither alternative can be at lower environmental cost.

(Appellants' Brief at 49). Appellants miss the point and misinterpret the law. A proposal with a smaller footprint is not required by WAC 197-11-440.

A similar argument was raised and rejected in *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. State Dep't of Transp.*, 90 Wn. App. 225, 231 n.2, 951 P.2d 812 (1998). At issue in that case was the adequacy of the EIS for a proposed by-pass around the City Sequim. The FEIS considered four alternatives all of which proposed a four-lane highway. The appellants in that case argued that the EIS was inadequate because it did not consider a smaller two-lane highway. The court of appeals concluded that the FEIS was not deficient even though it

only included four-lane alternatives and did not address a smaller two-lane alternative. *Concerned Taxpayers*, 90 Wn. App. at 231.

Appellants' argument is also premised on the notion that an alternative must lower the environmental costs across the board in order for it to be adequate. This argument is equally without merit. Alternatives are adequate even if they have greater impacts in some areas but fewer impacts in others. *King County v. Cent. Puget Sound Growth Mgmt Hearings Bd.*, 138 Wn.2d 161, 184, 979 P.2d 374 (1999).

The alternatives presented in the EIS lowered the environmental impacts. For instance, the Brinnon Subarea Plan Alternative would extend the MPR boundary to 310 acres and include property west of US 101 and north of the marina. While many of the impacts would be the same, the EIS does note that extending the MPR boundary has environmental benefits. An expanded MPR boundary would permit wells to be placed farther upland, which "would reduce any limited risk of salt water intrusion as a result of the increased water demand of the larger BSAP model." (AR 001205). Similarly, the BSAP alternative would incorporate the properties north of the marina into the sewer system and thus eliminate a commercial septic system on the shores of Hood Canal. (AR 001208).

Here, both proposals accomplish the goal of providing decision-makers with a "reasonably thorough discussion of the significant aspects

of the probable environmental consequences." *Citizens*, 122 Wn.2d at 623. Appellants themselves have not identified any impacts that were not properly identified or adequately mitigated through the EIS process.¹⁸ Absent such a showing the claim is inadequate and must be dismissed.

3. The County Complied with WAC 197-11-660.

Finding 63 of the Ordinance lists a number of conditions that the County imposed to guide the subsequent phases of MPR development and reduce and limit the environmental impacts from this proposal. (AR 00417-442). The BOCC imposed the conditions pursuant to "the authority that is granted the County legislative authority under SEPA by RCW 43.21C.060, WAC 197-11-660, and Jefferson County Code 18.40.770." (AR 001632, ¶63).

Ironically, many of these conditions were imposed as a result Appellants' comments. Yet, Appellants now contend that conditions were improperly imposed because Jefferson County failed to follow each condition with a specific policy to support the condition. Statesman did not appeal or contest any of the conditions.

Agencies may condition or deny a proposal pursuant to SEPA. RCW 43.21C.060. Such mitigation measures must be based upon identified impacts and designated policies to address the impacts:

¹⁸ Appellants had challenged the adequacy of the stormwater mitigation below, but have abandoned that argument on appeal to the Court. (AR 000186).

Mitigation measures or denials shall be based on policies, plans, rules, or regulations formally designated by the agency (or appropriate legislative body, in the case of local government) as a basis for the exercise of substantive authority and in effect when the DNS or DEIS is issued.

WAC 197-11-660(1)(a). Contrary to Appellants' argument, this section does not require that each condition be followed with a specific SEPA policy that supports the conditions. Rather, the language only requires that the conditions be based upon formally designated SEPA policies. There is no dispute that Jefferson County's formally designated SEPA policies are set forth in JCC 18.40.700 and that the BOCC cited this provision to support the conditions. (AR 000998, ¶63).¹⁹ Nor is there any

¹⁹ JCC 18.40.770 sets forth the County's substantive SEPA authority:

(3) The county designates and adopts by reference the following county plans, ordinances and policies as the basis for exercise of county authority pursuant to this article:

(a)The county adopts by reference the policies in the following Jefferson County plans and ordinances:

(i)The Jefferson County Comprehensive Plan, as now exists or may hereafter be amended;

(ii)The Jefferson County Shoreline Master Program, as now exists or may hereafter be amended;

(iii)This Unified Development Code, as now exists or may hereafter be amended;

(iv)The Jefferson County building code, Chapter 15.05 JCC, as now exists or may hereafter be amended;

(v)The Jefferson County flood damage protection ordinance, Chapter 15.15 JCC, as now exists or may hereafter be amended;

(vi)The Jefferson County stormwater management ordinance, JCC 18.30.070, as now exists or may hereafter be amended;

(vii)The Jefferson County Road, Traffic and Circulation Standards, as they now exist or may hereafter be amended;

(viii)The Secretary of the Interior's Standards for Rehabilitating Historic Buildings; and

(ix)All other county plans, ordinances, regulations and guidelines adopted after the effective date of this Unified Development Code.

any dispute that these designated policies support the conditions. Rather Appellants only grievance is that Jefferson County should have called out each policy that supports each condition.

Appellants' reliance on *Levine v. Jefferson County*, 116 Wn.2d 575, 807 P.2d 363 (1991), is misplaced and quoted out of context:

In *Levine v. Jefferson County*, the Levine Court interpreted RCW 43.21C.060 and ruled that the record must show specific 'identifiable policies in attaching the mitigative restrictions' under SEPA.

(Brief at 55 (internal citations omitted)). Contrary to Appellants' portrayal, the *Levine* court expressly concluded that the evidence in the record need only show that the County "considered any identifiable policies in attaching the mitigative restrictions." 116 Wn. 2d. at 581 (emphasis added to highlight language missing from quoted material in Appellants' Opening Brief). *Levine* does not hold that each condition must be followed with a specific SEPA policy as Appellants contend. Moreover, the issue in *Levine* was whether Jefferson County had designated identifiable SEPA policies at all—not whether the County was required to cite to a policy for each mitigative condition. The court never even reached this question, concluding that the record failed to identify

any impacts that would warrant mitigation in the first place. *Id.* at 582.

Levine does not support Appellants' argument.²⁰

Nevertheless, even if this Court were to construe WAC 197-11-660 to require that each SEPA condition be followed by a citation to the specific SEPA policy that supports the condition, which it should not, Appellants' argument still should be dismissed. Failing to cite each specific SEPA policy is a procedural error. *See Concerned Taxpayers*, 90 Wn. App. at 233 (noting that the failure to properly incorporate a report into an FEIS pursuant to WAC 197-11-635 was a procedural error). Under the rule of reason standard of review, procedural errors that have no consequence are properly dismissed. *Id.* Appellants have presented no evidence in the record that demonstrates that they were somehow prejudiced by the lack of a specific SEPA policy for each condition. To the contrary, the conditions further advance Appellants' goal, which explains why Appellants have not appealed any of the conditions themselves. Thus, the alleged error is of no consequence and should properly be dismissed.

²⁰ Notably, if the Court were to conclude that the mitigation measures were not properly imposed the remedy is to remove the conditions and allow the proposal to move forward without them. *Levine*, 116 Wn.2d at 582.

C. The Clallam County Superior Court Correctly Dismissed the Appellants' Verified Complaint for a Constitutional Writ of Certiorari and a Statutory Writ of Review.

1. The Court Properly Dismissed Appellants' Claim for Statutory Writ of Review.

Appellants' Complaint sought relief under the Constitutional Writ of Certiorari and Statutory Writ of Review for alleged violations of the PEA, chapter 36.70 RCW. Appellants concede that their request for a Statutory Writ of Review is without merit, and that it was properly dismissed. The statutory writ of review is only available to review actions that are judicial in nature; the statutory writ is not available to review legislative acts. *See Leavitt v. Jefferson County*, 74 Wn. App. 668, 677, 875 P.2d 681 (1994). Appellants repeatedly assert that the County's decision is a legislative act. (Brief at 32, 33). Accordingly, the Statutory Writ of Review was properly dismissed and Appellants do not contend otherwise. The only question then is whether the Superior Court properly dismissed Appellants' claim for a Constitutional Writ of Certiorari.

2. Standard of Review: Dismissing a Complaint for a Constitutional Writ of Certiorari Is Reviewed for an Abuse of Discretion.

The Constitutional Writ of Certiorari is derived from article 4, section 6 of the Washington Constitution. The superior courts have inherent authority to entertain a writ of review under article 4, section 6 of the Washington Constitution. "A constitutional writ of certiorari is not a

matter of right, but discretionary with the court." *Torrance v. King County*, 136 Wn.2d 783, 787, 966 P.2d 891 (1998). Accordingly, a superior court's decision not to issue the writ by dismissing the complaint is reviewed for an abuse of discretion. *Snohomish County v. State Shorelines Hearings Bd.*, 108 Wn. App. 781, 32 P.3d 1034 (2001); *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 714, 943 P.2d 341 (1997) (applying abuse of discretion standard to writ or review that was dismissed); *see also Concerned Organized Women and People Opposed to Offensive Proposals, Inc. v. City of Arlington*, 69 Wn. App. 209, 221, 847 P.2d 963 (1993).

A trial court may refuse to exercise its inherent power of review so long as the court gives tenable reasons to support its discretionary decision. *Bridle Trails Comty. Club v. City of Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986). Once a writ has been issued, the superior court's decision on the merits is reviewed de novo. *See Leavitt*, 74 Wn. App. at 677.

3. The GMA and the PEA Are Related Statutes and Must Be Construed Together.

Appellant's arguments addressing the Clallam County decision are only successful if the Court construes the PEA in a vacuum. The PEA and the GMA, however, are two related statutes and must be construed

together. *Whatcom County v. Brisbane*, 125 Wn.2d 345, 884 P.2d 1326 (1994). "In ascertaining legislative purpose, statutes which stand *in pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes." *Hallauer v. Spectrum Properties, Inc.* 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (quoting *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974)). In ascertaining the legislative intent courts "also consider the sequence of all statutes relating to the same subject matter." *Hallauer*, 143 Wn.2d at 146.

The PEA was enacted in 1963. Laws of 1963, ch.4. The PEA authorized counties to conduct comprehensive land use planning upon creation of a planning agency. RCW 36.70.050. RCW 36.70.320 directs the planning agency to prepare a comprehensive plan that, on approval by the county commissioners, becomes the "blueprint" for orderly development of the county. RCW 36.70.030. The PEA provides that reports and recommendations of the planning commission relating to plats, subdivisions and other "official controls" are advisory only, the final decision as to such controls resting with the county board. RCW 36.70.020(11).²¹ The PEA identified the process by which a county could

²¹ "Official controls" means legislatively defined and enacted policies, standards, precise detailed maps and other criteria, all of which control the physical development of a county or any part thereof or any detail thereof, and are the means of translating into

engage in the planning process but contained few substantive requirements about content.

The GMA, adopted some 27 years later in 1990 contains a number of substantive goals, objectives, contents and considerations required to be included in the comprehensive plans. As noted above, the GMA also specifically addressed when additional public hearings were required where the County makes changes to the recommendations of the planning commission and after the opportunity for public comment has expired. When the change is within the range of propose alternatives in an EIS that was subject to public review no additional hearing is required. RCW 36.70A.035. These common sense provisions assure that comprehensive planning is not bogged down in a procedural quagmire, which is precisely what the Appellants seek to achieve here. Accordingly, the procedural components in the PEA must be construed in harmony with the subsequently enacted provisions of the Growth Management Act.

4. The Clallam County Superior Court Did Not Abuse its Discretion when It Refused to Issue the Writ Because Appellants Had Another Adequate Remedy at Law.

"A writ of review, either constitutional or statutory, will not lie when there is an adequate remedy at law, such as by direct appeal from the regulations and ordinances all or any part of the general objectives of the comprehensive plan. Such official controls may include, but are not limited to, ordinances establishing zoning, subdivision control, platting, and adoption of detailed maps." RCW 36.70.020(11).

final judgment." *Snohomish County v. Shorelines Hearings Board*, 108 Wn. App. at 785. Notably, the standard is whether Appellants have an adequate remedy, not whether they believe the superior court could fashion a superior remedy.

Appellants' position that the Growth Board did not provide an adequate remedy at law for the alleged violations of the PEA is based upon two arguments: (1) the Growth Board can only review the Ordinance for compliance with the GMA and SEPA and not the PEA; and (2) the Growth Board cannot void an ordinance. Both arguments are unavailing and fail to demonstrate that the Clallam County Superior Court erred when it refused to issue the writ by dismissing the Complaint.

First, Appellants cannot seriously contend that the Growth Board did not review the Ordinance for compliance with the provisions of the PEA. The Growth Board, at the Appellants' request, agreed to consider and did consider the same alleged violations of the PEA as were asserted in the Complaint to Clallam County.²² (*See e.g.* AR 002613-2614, 002623-002624). Appellants' Brief to this Court even argues that the Growth Board misinterpreted and misapplied the provisions of the

²² Appellants even admit that they were required to pursue relief before the Growth Board before seeking a Writ of Certiorari. (Brief at 29). If Appellants truly believed their claims could not be heard before the Growth Board they would have pursued the Clallam County action immediately. Their decision to wait demonstrates that they simply wanted another bite at the apple in the event that the Growth Board ruled against them.

Planning Enabling Act. (See, e.g. Brief at 37-39). Simply because the Growth Board did not rule in Appellants' favor does not equate to the lack of an adequate remedy at law.²³

The thrust of Appellants argument seems to be that a different standard of review should apply to a pure PEA challenge: substantial compliance versus compliance with the spirit of the public participation provisions. (Brief at 27-28). No Washington court has concluded what standard of review would apply to PEA claims post-GMA, and the PEA itself is silent. As explained above, however, the PEA must be construed in harmony with the GMA. Accordingly, the GMA's express standard of compliance with the spirit of the program and procedures for comprehensive plan amendments should apply, not an unexpressed substantial compliance standard asserted by Appellants.

Similarly, the GMA expressly waives additional public hearings for changes that are contemplated in an EIS. Appellants argue that since the BOCC changed the Planning Commission's recommendation, it was

²³ Moreover, Appellants simply presume without citing any authority that the Growth Board does not have jurisdiction over PEA issues. While the Growth Board may have ruled that it lacks jurisdiction over Planning Enabling Act issues, no court has ever addressed that issue in a reported decision. Decisions of the Growth Board are not binding on the Court of Appeals. *Floating Homes Ass'n v. Dep't of Fish & Wildlife*, 115 Wn. App. 780, 788, 64 P.3d 29 (2003). At a minimum, Appellants should have advanced their arguments before the Growth Board and on appeal. They did not and their failure to do so pulls this case squarely within *Torrance v. King County*. 136 Wn.2d 783, 793, 966 P.2d 891 (1998) (dismissing writ because Plaintiff failed to pursue an administrative appeal decision).

required to remand the matter to the Planning Commission for another public hearing under the PEA²⁴. Even assuming there was a change, this Court must interpret the PEA in harmony with the GMA, which obviates the need for additional public hearings if the changes are within the range of alternatives considered in an EIS. RCW 36.70A.035(2)(b). To interpret the PEA in any other way would render RCW 36.70A.035(2)(b) superfluous for Counties planning under the PEA.²⁵

Appellants also contend that the Clallam County Superior Court erred in dismissing the Complaint because the Growth Board could not void the ordinance—the preferred remedy of the Appellants. This is also incorrect. Again, the PEA is silent with respect to the remedy that should be provided in the event of a PEA violation. The Legislature did make clear in the GMA, however, that procedural irregularities should not stand in the way of comprehensive planning. *See* RCW 36.70A.140. Accordingly, the Legislature gave the Growth Board the discretion to declare a comprehensive plan invalid only if it substantially interferes with the goals of the GMA. RCW 36.70A.302. The Legislature did not intend

²⁴ Appellants argument presumes that there was a change in the first place; the Growth Board correctly concluded that the BOCC did not change the Planning Commission Recommendation within the meaning of the PEA.

²⁵ Appellants will likely assert that Respondent's view renders the PEA superfluous. That, however, is not the case. If a change to a planning commission's recommendation does not fall within the scope of RCW 36.70A.035(2)(b) than it would be remanded back to the Planning Commission for additional public hearings.

to compromise the efficacy of comprehensive planning that is otherwise consistent with the mandates of the GMA by subjecting it to a more rigorous standard under other planning statutes.

V. CONCLUSION

The Appellants have failed to demonstrate that the Growth Board erred in affirming Ordinance No. 01-0128-8. The Appellants have also failed to demonstrate that the Clallam County Superior Court abused its discretion when it refused to issue the requested writs. Statesman respectfully requests that this Court affirm both decisions and deny the Appellants' appeal.

DATED: December 21, 2009

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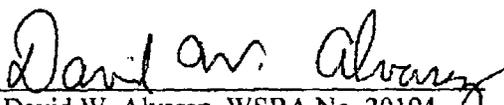
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cc: DCD
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PC
Sheriff } 1/31/08

STATE OF WASHINGTON
County of Jefferson

AN ORDINANCE APPROVING ONE } Ordinance No. 01-0128-08
COMPREHENSIVE PLAN AMENDMENT, }
FILE NUMBER }
MLA06-87 [STATESMAN] }

WHEREAS, the Board of Jefferson County Commissioners ("the Board") has, as required by the Growth Management Act ("the GMA"), as codified at RCW 36.70A.010 et seq., set in motion and now completed the proper professional review and public notice and comment with respect to any and all proposed amendments to the County's Comprehensive Plan originally adopted by Resolution No. 72-98 on August 28, 1998 and as subsequently amended, and;

WHEREAS, as mandated by the GMA, the Board has reviewed and voted upon the proposed amendments to the County's Comprehensive Plan ("CP") that composed the 2007 Comprehensive Plan Amendment Docket ("the Docket"), and;

WHEREAS, of the ten (10) proposals that compose the Docket, three (3) were rejected; one proposal, MLA07-104, has been forwarded to the 2008 CP Cycle; the Board has approved or approved with conditions six (6) of the remaining proposals, five (5) of which are analyzed in Ordinance No. 02-0128-08; herein analyzed is only one proposal, MLA06-87 [Statesman], which was approved unanimously by the Board; and

WHEREAS, an adopting Ordinance is required to formalize the Board's legislative decision with respect to MLA06-87, and;

WHEREAS, the Board makes the following Findings of Fact and Conclusions with respect to the 2007 Comprehensive Plan Amendment Cycle and the amendment contained herein:

1. The County adopted its Comprehensive Plan in August 1998 and its development regulations or Unified Development Code (UDC), Title 18 in the Jefferson County Code (JCC) in December 2000. The CP was reviewed and updated in 2004.
2. The Growth Management Act (GMA), which mandates that Jefferson County generate and adopt a CP, also requires that there be in place a process to amend the CP. The UDC contains precisely such a process in Section 9, and in Title 18 in the JCC.

3. The amendment process for the CP must be available to the citizens of this County [including corporations and other business entities] on a regular basis. In accordance with RCW 36.70A.130, CP amendments can generally be considered “no more frequently than once per year.”
4. This particular amendment “cycle” began on or before March 1, 2007, the deadline for submission of a proposed CP amendment.
5. MLA06-87 was timely filed on by March 1, 2006, and carried over to the 2007 cycle in December 2006, because a separate environmental impact statement was deemed necessary, and this work could not be performed in 2006.
6. The 2007 CP process started with nine formal site-specific amendments and three suggested amendments (for a total of twelve), all of which were placed on the Preliminary Docket through the CP amendment process contained at JCC Section 18.45.050.
7. The Planning Commission and the Board of County Commissioners held a joint workshop on April 4, 2007 to provide an opportunity for the site-specific CP amendment applicants to make public presentations on their proposals.
8. The Planning Commission held a duly-noticed public hearing on the Preliminary Docket on April 18, 2007.
9. The Planning Commission completed its recommendation on the Preliminary Docket on April 18, 2007, recommending that all twelve original CP amendment applications be placed on the Final Docket.
10. The Department of Community Development (DCD) issued a Review of Preliminary Docket on May 7, 2007, analyzing the proposals on the Preliminary Docket and offering the following recommendation: that two of the three suggested amendments be eliminated from the Final Docket due to limitations on staff resources.
11. The Board established the Final Docket on May 14, 2007 as nine site-specific amendments plus one suggested amendment.
12. The Department of Community Development (DCD) issued an integrated Staff Report and State Environmental Policy Act (SEPA) Addendum on September 5, 2007, analyzing the proposals on the Final Docket and offering preliminary recommendations for each.

13. All of these amendments have been subject to a SEPA-driven analysis through the DCD Staff Report and SEPA Addendum dated September 5, 2007. In addition, a separate Draft Environmental Impact Statement was published on this date pertaining to the site-specific application analyzed in this ordinance, MLA06-87 (Statesman), with an associated 45-day public comment period ending at close of business on October 24, 2007. An associated addendum issued with the Final Environmental Impact Statement was published on November 27, 2007. For further analysis of the other five (5) amendments comprising the 2007 CP cycle, see Ordinance No. 02-0128-08.
14. The Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS) were undertaken and generated pursuant to the State Environmental Protection Act (SEPA) and a determination by the SEPA-responsible official that the proposed amendment, MLA06-87, warranted a threshold "Determination of Significance" (DS), and thus environmental review for any probable significant adverse environmental impacts, although the environmental review at this stage was the review appropriate for a non-project action as that term of art is defined in SEPA.
15. The FEIS was prepared in conformance with SEPA requirements and the amendment in this ordinance is the alternative identified in the DEIS as "the proposal."
16. The Planning Commission held a duly-noticed public hearing on MLA06-87 (Statesman) on October 3, 2007. Oral public comment related to this proposed amendment was taken during the public hearing, and written comments were accepted through the close of business on October 24, 2007.
17. The Planning Commission deliberated on MLA06-87 at special meetings on October 31, 2007, and on November 14, 2007, reviewing the growth management indicators, findings, and conclusions relative to JCC 18.45, and completed recommendations on November 20, 2007.
18. The above statements indicate that the proposed CP amendment was and is the subject of "early and continuous" public participation as is required by GMA.
19. The Planning Commission recommendations were transmitted to the Board through formal memoranda dated November 28, 2007, and are part of the record for the legislative decision.

20. The Planning Commission recommended to the Board seven conditions be attached to approval of this proposal, MLA06-87 [Statesman]. The conditions were included in the Planning Commission recommendations specific to this proposal.
21. The FEIS and addendum associated with this proposal were published on November 27, 2007. Initial scoping identified probable significant adverse impacts. Public comments elaborated on those concerns, and the final EIS included staff responses to 17 different categories covered in over 400 public comment letters, expressed orally and in writing by the public and by various local and state agencies regarding this application during the public comment period.
22. The FEIS detailed mitigating conditions resulting from these comment letters as specified in Chapter 5, overall representing a meticulous and thorough response to the concerns of the citizens and agencies, precisely what is intended by SEPA.
23. The Board held a duly-noticed public hearing on December 3, 2007 and continued this public hearing on December 6, 2007, closing the public comment period on December 7, 2007. The Board did consider all public comments received.
24. The final DCD staff recommendation was presented to the Board during the December 3, 2007 and December 6, 2007 public sessions in which the Planning Commission recommendations were also presented.
25. The final DCD staff recommendation did not match the Planning Commission recommendation for approval, having different proposed modifications attached.
26. On December 10, 2007, the Board signed Resolution No. 113-07 extending the timeframe for the legislative decision on the proposed amendment to January 14, 2008.
27. All procedural and substantive requirements of the GMA have been satisfied.
28. The Board of County Commissioners deliberated and decided to approve the Statesman proposal on January 14, 2008.
29. DCD staff presented to the Board a 14-step process for decision-making. Step 1: It was moved and seconded "to approve the Statesman proposal as revised with conditions, and to amend the Jefferson County Comprehensive Plan on pages 3-23 and 3-45.

- Step 2: The Comprehensive Plan land use map designations on page 3-45 for this area would be changed to reflect a Master Planned Resort as outlined in the November 27, 2007 Final Environmental Impact Statement on page 1-4." See Exhibit "B" to this Ordinance.
30. Step 3: The Board was required to apply criteria from JCC 18.45.080, generally referred to as deliberations, findings and conclusions, and growth management indicators.
 31. Step 4: The Board entered an affirmative statement that consistency with the Growth Management Act, specifically RCW 36.70A.360(1) through (4), is achieved, as each of the pertinent criteria are met by this proposal.
 32. With respect to RCW 36.70A.360(1), the Board hereby enters an affirmative statement that the proposed Master Planned Resort would be a "self-contained and fully integrated planned unit development, in a setting of significant natural amenities with primary focus on destination resort facilities consisting of short-term visitor accommodations."
 33. With respect to RCW 36.70A.360(4) the Board hereby enters an affirmative statement that its CP already includes policies to guide the development of new MPR, the CP and the related development regulations serve to preclude urban or suburban land uses in the vicinity of the MPR, the land at the site in question is better suited for an MPR than for the commercial harvesting of timber or agricultural production, the MPR plan is and will be consistent with all GMA-derived development regulations relating to GMA critical areas and all on-site and off-site infrastructure and service impacts have been fully considered and will be mitigated as the MPR is implemented first through a development agreement, internal zoning map and internal zoning code, then through plat and permit review and possible issuance of permits and, with all the prior items accomplished, finally with the issuance of building permits.
 34. Step 5: The Board entered an affirmative statement that consistency with the Jefferson County Comprehensive Plan, specifically Land Use Policies 24.1-24.13, has been achieved by the applicant, as each of the pertinent criteria are met by this proposal. By way of example only, the Board's affirmative finding that the site of the proposed MPR is better suited to become an MPR than it is to be the site of a commercial timber harvest serves to satisfy the condition laid out in the CP at LNP 24.4, found at p. 3-65 of the CP. The area is

zoned Rural Residential and not Commercial Forest under the Growth Management Act, and therefore this finding is not required within the proposal.

35. Step 6: The Board entered an affirmative statement that consistency with the Brinnon Sub-Area Plan, adopted on May 1, 2002, specifically Goals 1.0 and Policies 1.1-1.3, is achieved, as each of the pertinent criteria are met by this proposal.
36. Step 7: With respect to JCC 18.15.126, the Board affirmed that only a Comprehensive Plan amendment application was under consideration, and that the development agreement and zoning code guiding MPR projects will come before it in a subsequent process after the adoption of this CP amendment. A subsequent development agreement and zoning code shall be consistent with this CP amendment. This criterion applies to each of the following code references contained within Step 7.
37. With respect to JCC 18.15.025 and JCC 18.15.115 on land use districts, the Board concluded that new zoning code language will be developed at a later phase, describing a second Master Planned Resort in Jefferson County, since Port Ludlow is the only MPR currently designated under the CP.
38. The Board affirmed the appropriateness of the proposal with respect to JCC 18.15.120 on purpose and intent, and consistency with RCW 36.70A.360. A new MPR is thus appropriate at this location.
39. The Board further determined that in accordance with JCC 18.15.123, a subsequent development agreement and zoning code will ensure consistency with said section.
40. The Board affirmed that the provisions of JCC 18.15.129 are applicable to this proposal, pertaining to the nature of the application as a Type V legislative process, and include a draft master plan (summarized in the FEIS), a site-specific CP amendment, and require a development agreement at a later phase in the process.
41. The Board affirmed that decision-making authority is granted to the Board under JCC 18.15.132, after ensuring the veracity of the planning commission process, and after reviewing its recommendations. A development agreement and zoning code will be developed in a subsequent phase.

42. With respect to 18.15.135, the Board concluded that the application to develop will take place at project-level phases subject to the development agreement and zoning code, consistent with this approval of the CP amendment.
43. The Board determined that 18.15.138 shall be amended at a later date to include revisions and/or additions to Title 17, in order to establish a zoning code for the Brinnon MPR. This shall be accomplished through a Type V legislative process.
44. Step 8: With respect to the directives set forth in RCW 36.70, the Planning Enabling Act, the Board concludes that all steps in the process were conducted properly, including the application submittal; the public process, review, and recommendations by the Planning Commission; the public process conducted by the Board; its own findings; and its position as the sole decision-making authority whereby the Planning Commission's recommendation is advisory only and the final determination always rests with the Board.
45. Steps 9-14: The Board determined that the procedural requirements of JCC Section 18.45.080(2)(c), in which for all adopted amendments the Board shall develop findings and conclusions which consider the growth management indicators set forth in a) JCC Section 18.45.050(4)(b) (i) through (vii, and b) items (i) through (iii) in JCC Section 18.45.080(1)(b), have been met. Findings and growth management indicators are further explained below.
46. SEPA mitigations called out in Chapter 5 of the FEIS shall be adhered to through development of a zoning code, development agreement, and any permit applications.
47. Further conditions of approval are identified in item # 63 (below). The Board directed staff to prepare this ordinance, provide for legal review, and prepare a record identifying all components of this CP application process.
48. Further, the Board voted unanimously to amend the CP.
49. JCC Section 18.45.080(1)(c), which contains eight criteria from which the Board must generate findings, is applicable only to site-specific Comprehensive Plan amendments.
50. Inquiry into the growth management indicators referenced above was begun for the 2007 Docket through the DCD integrated Staff Report and SEPA Addendum of September 5, 2007. The Board's findings and conclusions with respect to the growth management

indicators are augmented by the September 5, 2007 staff findings and conclusions, except when and as noted below.

51. With respect to JCC Section 18.45.050(4)(b)(i), which asks whether assumptions regarding growth and development have changed since the initial CP adoption, the Board concludes that census data indicates that the population growth rate in this county has slowed in the last two to four years, and is slower than projected.
52. With respect to JCC Section 18.45.050(4)(b)(ii), which asks whether the capacity of the County to provide adequate services has diminished or increased, the Board concludes that this CP amendment as conditioned will not impact the ability of the County to provide services.
53. With respect to JCC Section 18.45.050(4)(b)(iii), which asks if sufficient urban land is or has been designated within the County, the Board concludes that this proposal may constitute additional urban lands (as allowed under RCW 36.70A.360) to the Jefferson County Comprehensive Plan amendments made effective by adoption of this Ordinance.
54. With respect to JCC Section 18.45.050(4)(b)(iv), which asks if any of the assumptions on which the initial CP was based have become invalid, the Board concludes that the assumptions upon which the CP is based have generally not changed.
55. With respect to JCC Section 18.45.050(4)(b)(v), which asks if any of the countywide attitudes upon which the CP was based have changed, the Board concludes that the countywide attitudes have not generally changed since this CP amendment was submitted.
56. With respect to JCC Section 18.45.050(4)(b)(vi), which asks if there has been a change in circumstance that may dictate the need for an amendment, the Board concludes that a conceptual Brinnon MPR was identified in the Brinnon Sub-Area Plan adopted into the County's CP on May 1, 2002, and that there have not been any overarching or countywide changes in circumstances that would dictate or require a shift in the policies reflected in the CP with respect to MPR designations.
57. With respect to JCC Section 18.45.050(4)(b)(vii), which asks if inconsistencies have arisen between the CP, the GMA and the Countywide Planning Policies, the Board concludes that these amendments do not reflect any such inconsistency, since a variety of rural residential densities is maintained even after adoption of this CP amendment.

58. Pursuant to JCC Sections 18.45.080(2)(c) and 18.45.080(1)(b), the Board finds that:
- (1) Circumstances related to the proposed amendment and/or the area in which it is located have not substantially changed since the adoption of the Jefferson County Comprehensive Plan.
 - (2) The assumptions upon which the Jefferson County Comprehensive Plan is based continue to be valid.
 - (3) Based upon public testimony, the proposed amendment may reflect current widely held values of the residents of Jefferson County.
59. In addition to the required findings set forth in JCC Section 18.45.080(1)(b), in order to recommend approval of a formal site-specific proposal to amend the Comprehensive Plan, the Board must also make eight (8) findings as specified in Section 18.45.080(1)(c)(i) through (viii).
60. Pursuant to JCC Section 18.45.080(1)(c), the Board enters the following findings:
- (i) The proposed site-specific amendment meets concurrency requirements for transportation and does not adversely affect adopted level of service standards for other public facilities and services (e.g., sheriff, fire, and emergency medical services, parks, fire flow, and general governmental services).
 - (ii) The proposed site-specific amendment is consistent with the goals, policies and implementation strategies of the various elements of the Jefferson County Comprehensive Plan.
 - (iii) The proposed site-specific amendment will not result in probable significant adverse impacts to the county's transportation network, capital facilities, utilities, parks, and environmental features that cannot be mitigated, and will not place uncompensated burdens upon existing or planned service capabilities.
 - (iv) The subject parcel is physically suitable for the requested land use designation and the anticipated land use development, including but not limited to the following:
 - a. Access
 - b. Provision of utilities; and
 - c. Compatibility with existing and planned surrounding land uses.

- (v) The proposed site-specific amendment will not create a pressure to change the land use designation of other properties, unless the change of land use designation for other properties is in the long-term best interests of the county as a whole.
 - (vi) The proposed site-specific amendment does not materially affect the land use and population growth projections that are the basis of the Comprehensive Plan.
 - (vii) If within an unincorporated urban growth area (UGA), the proposed site-specific amendment does not materially affect the adequacy or availability of urban facilities and services to the immediate area and the overall UGA.
 - (viii) The proposed amendment is consistent with the Growth Management Act (Chapter 36.70A RCW), the Countywide Planning Policy for Jefferson County, applicable inter-jurisdictional policies and agreements, and local, state and federal laws.
61. Master Planned Resorts are governed under a distinct statutory provision within the GMA. They are not Rural Lands, and thus are not Limited Areas of More Intensive Rural Development (LAMIRDs). Instead, RCW 36.70A.360 provides that **new** MPRs "...may constitute urban growth outside of urban growth areas as limited by this section."
62. MLA06-87 is submitted by Statesman Group of Companies, LTD. The application is for a Master Planned Resort (MPR) designation. (See Exhibit A for the complete legal description and Exhibit B for a map.)
63. In consideration of the public interest, and pursuant to the authority that is granted the County legislative authority under SEPA by RCW 43.21C.060, WAC 197-11-660 and Jefferson County Code 18.40.770, the Board enters certain of the following conditions for approval of the CP amendment MLA06-87, recognizing that certain of the conditions listed here are imposed not in reliance upon SEPA but instead pursuant to the Board's general police power as a legislative body [arising from Article XI, § 11 of the State Constitution and RCW 36.32.120(7)], particularly conditions d, e, f, g, v, x, aa and bb:
- a) Any analysis of environmental impacts is to be based on science and data pertinent to the Brinnon site. This includes rainfall projections, runoff projections, and potential impacts on Hood Canal.

- b) All applications will be given an automatic SEPA threshold determination of Determination of Significance (DS) at the project level except where the SEPA-responsible official determines that the application results in only minor construction.
- c) The project developer will be required to negotiate memoranda of understanding (MOU) or memoranda of agreement (MOA) to provide needed support for the Brinnon school, fire district, Emergency Medical Services (EMS), housing, police, public health, parks and recreation, and transit prior to approval of the development agreement. Such agreements will be encouraged specifically between the developer and the Pleasant Tides Yacht Club, and with the Slip owner's Association regarding marina use, costs, dock access, loading and unloading, and parking.
- d) A list of required amenities shall be in the development agreement along with conditions for public access.
- e) Statesman shall advertise and give written notice at libraries and post offices in East Jefferson County and recruit locally to fill opportunities for contracting and employment, and will prefer local applicants provided they are qualified, available, and competitive in terms of pricing.
- f) Statesman will prioritize the sourcing of construction materials from within Jefferson County.
- g) The developer shall commission a study of the number of jobs expected to be created as a direct or indirect result of the MPR that earn 80% or less of the Brinnon area average median income (AMI). The developer shall provide affordable housing (e.g., no more than 30% of household income) for the Brinnon MPR workers roughly proportional to the number of jobs created that earn 80% or less of the Brinnon area AMI. The developer may satisfy this condition through dedication of land, payment of in lieu fee, or onsite housing development.
- h) The possible ecological impact of the development's water plan that alters kettles for use as water storage must be examined, and possibly one kettle preserved.
- i) Any study done at the project level pursuant to SEPA (RCW 43.21C) shall include a distinct report by a mutually chosen environmental scientist on the impacts to the hydrology and hydrogeology of the MPR location of the developer's intention to use

one of the existing kettles for water storage. Said report shall be peer-reviewed by a second scientist mutually chosen by the developer and the county. The developer will bear the financial cost of these reports.

- j) Tribes should be consulted regarding cultural resources, and possibly one kettle preserved as a cultural resource.
- k) As a condition of development approval, prior to the issuance of any shoreline permit or approval of any preliminary plat, there shall be executed or recorded with the County Auditor a document reflecting the developer's written understanding with and among the following: Jefferson County, local tribes, and the Department of Archaeology and Historical Preservation, that includes a cultural resources management plan to assure archaeological investigations and systematic monitoring of the subject property prior to issuing permits; and during construction to maintain site integrity, provide procedures regarding future ground-disturbing activity, assure traditional tribal access to cultural properties and activities, and to provide for community education opportunities.
- l) A wildlife management plan focused on non-lethal strategies shall be developed in the public interest in consultation with the Department of Fish and Wildlife and local tribes, to prevent diminishment of tribal wildlife resources cited in the Brinnon Sub-Area Plan (e.g., deer, elk, cougar, waterfowl, osprey, eagles, and bear), to reduce the potential for vehicle collisions on U.S. Highway 101, to reduce the conflicts resulting from wildlife foraging on high-value landscaping and attraction to fresh water sources, to reduce the dangers to predators attracted to the area by prey or habitat, and to reduce any danger to humans.
- m) No deforestation or grading will be permitted prior to establishing adequate water rights and an adequate water supply.
- n) Approval of a Class A Water System by the Washington Department of Health, and approval of a Water Rights Certificate by the Department of Ecology shall be required prior to applying for any Jefferson County permits for plats or any new development.
- o) Detailed review is needed at the project-level SEPA analysis to ensure that water quantity and water quality issues are addressed. The estimated potable water use is

based on a daily residential demand used to establish the Equivalent Residential Units (ERU) for the development using a standard of 175 gallons per day (gpd). The goal of the development is 70 gpd. All calculations for water use at any stage shall be based on the standard of 175 gpd.

- p) A Neighborhood Water Policy shall be established that requires Statesman to provide access to the water system by any neighboring parcels if saltwater intrusion becomes an issue for neighboring wells on Black Point, and reserve areas for additional recharge wells will be included in case wells fail, are periodically inoperable, or cause mounding.
- q) Stormwater discharge from the golf course shall meet requirements of zero discharge into Hood Canal. To the extent necessary to achieve the goal of designing and installing stormwater management infrastructures and techniques that allow no stormwater run-off into Hood Canal, Statesman shall prepare a soil study of the soils present at the MPR location. Soils must be proven to be conducive to the intended infiltration either in their natural condition or after amendment. Marina discharge shall be treated by a system that reduces contamination to the greatest possible extent.
- r) A County-based comprehensive water quality monitoring plan specific to Pleasant Harbor requiring at least monthly water collection and testing will be developed and approved in concert with an adaptive management program prior to any site-specific action, utilizing best available science and appropriate state agencies. The monitoring plan shall be funded by a yearly reserve, paid for by Statesman, that will include regular offsite sampling of pollution, discharge, and/or contaminant loading, in addition to any onsite monitoring regime.
- s) The developer must ensure that natural greenbelts will be maintained on U.S. Highway 101 and as appropriate on the shoreline. Statesman shall record a conservation easement protecting greenbelts and buffers to include, but not be limited to, a 200-foot riparian buffer along the steep bluff along the South Canal shoreline, the strip of mature trees between U.S. Highway 101 and the Maritime Village, wetlands, and wetland buffers. Easements shall be perpetual and irrevocable recordings dedicating the property as natural forest land buffers. Statesman, at its expense, shall manage these

easements to include removing, when appropriate, naturally fallen trees, and replanting to retain a natural visual separation of the development from Highway 101.

- t) The marina operations shall conduct ongoing monitoring and maintain an inventory regarding Tunicates and other invasive species, and shall be required to participate with the County and state agencies in an adaptive management program to eliminate, minimize, and fully mitigate any changes arising from the resort, and related to Pleasant Harbor or the Maritime Village.
- u) In keeping with the MPR designation as located in a setting of natural amenities, and in order to satisfy the requirements of the Shoreline Master Program (JCC 18.15.135(1),(2),(6), the greenbelts of the shoreline should be retained and maintained as they currently exist in order to provide for “the screening of facilities and amenities so that all uses within the MPR are harmonious with each other, and in order to incorporate and retain, as much as feasible, the preservation of natural features, historic sites, and public views.” In keeping with Comprehensive Plan Land Use Policy 24.9, the site plan for the MPR shall “be designed to blend with the natural setting and, to the maximum extent possible, screen the development and its impacts from the adjacent rural areas.” Evergreen trees and understory should remain as undisturbed as possible. Statesman shall infill plants where appropriate with indigenous trees and shrubs.
- v) In keeping with an approved landscaping and grading plan, and in order to satisfy the intent of JCC 18.15.135(6), and with special emphasis at the Maritime Village, the buildings should be constructed and placed in such a way that they will blend into the terrain and landscape with park-like greenbelts between the buildings.
- w) Construction of the MPR buildings will be completed in a manner that strives to preserve trees that have a diameter of 10 inches or greater at breast height (dbh). An arborist will be consulted and the ground staked and flagged to ensure the roots and surrounding soils of significant trees are protected during construction. To the extent possible, trees of significant size (i.e., 10 inches or more in diameter at breast height (dbh)) that are removed during construction shall be made available with their root wads intact for possible use in salmon recovery projects.

- x) Statesman shall use the LEED (Leadership in Energy and Environmental Design) and “Green Built” green building rating system standards. These standards, applicable to commercial and residential dwellings respectively, “promote design and construction practices that increase profitability while reducing the negative environmental impacts of buildings, and improving occupant health and well-being.”
- y) There shall be included as a best management practice for the operation and maintenance of a golf course within the MPR that requires the developer to maintain a log of fertilizers, pesticides, and herbicides used on the MPR site, and this information will be made available to the public.
- z) Statesman shall use the International Dark Sky Association (IDA) Zone E-1 standards for the MPR. These standards are recommended for “areas with intrinsically dark landscapes” such as national parks, areas of outstanding natural beauty, or residential areas where inhabitants have expressed a desire that all light trespass be limited.
- aa) In fostering the economy of South Jefferson County by promoting tourism, the housing units at the Maritime Village should be limited to rentals and time-shares; or, at the very least, it should be mandated that each section be required to keep the ratio of 65% to 35% of rental and time-shares to permanent residences per JCC 18.15.123(2).
- bb) Verification of the ability to provide adequate electrical power shall be obtained from the Mason County Public Utility District.
- cc) Statesman Corporation shall collaborate with the Climate Action Committee (CAC) to calculate greenhouse gas emissions (GHGs) associated with the MPR, and identify techniques to mitigate such emissions through sequestration and/or other acceptable methods.
- dd) Statesman Corporation is encouraged to work with community apprentice groups to identify and advertise job opportunities for local students.

NOW, THEREFORE, BE IT ORDAINED as follows:

Section One: Under MLA06-87 [Statesman], the map of Comprehensive Land Use Designations is hereby amended to reflect that the parcels of property located in Brinnon, Washington, and found in the legal description (see Exhibit A to this Ordinance) accompanying this CP application, shall be given in their entirety an underlying land use designation of Master Planned Resort.

Section Two: The Comprehensive Plan narrative on page 3-23 would be amended to add language below the last paragraph that would read:

Early in 2008, Jefferson County designated a new Master Planned Resort (MPR) in Brinnon. The new Master Planned Resort is 256 acres in size and includes the Pleasant Harbor and Black Point areas. The Marina area is existing and would be further developed to include additional commercial and residential uses such as townhouses and villas. The Black Point area of the new resort would include new facilities such as a golf course, a restaurant, a resort center, townhouses, villas, staff housing, and a community center. The overall residential construction would not exceed 890 total units.

Section Three: If any section of this Ordinance is deemed either non-compliant or invalid pursuant to the Growth Management Act, then the development regulations and/or underlying zoning designations applicable to that parcel or parcels prior to adoption of the non-compliant or invalid section of this Ordinance shall be applicable to that parcel or parcels.

Section Four: If any section of this Ordinance is deemed either non-compliant or invalid pursuant to the Growth Management Act, such a finding of non-compliance or invalidity shall not nullify or invalidate any other section of this Ordinance.

Section Five: The map and legal description are hereby incorporated by attachment.

Section Six: In consideration of the weather emergency situations of December 2007, and within the overall public interest, the Board extended the decision date on these CP amendments to January 14, 2008 by Resolution No. 113-07. The Board's adoption of the motion approving the MPR for Black Point met the legislative intent of Resolution 113-07 as the decision date for the legislative decision. This Ordinance becomes effective on the date it is executed.

APPROVED AND ADOPTED this 28th day of January, 2008.



JEFFERSON COUNTY BOARD OF COMMISSIONERS

Phil Johnson, Chairman

David Sullivan

Julie Matthes, CMC
Deputy Clerk of the Board

John Austin

Approved as to form:

David Alvarez, Deputy Civil Prosecuting Attorney

Exhibit A Ordinance No. 01-0128-08

The Pleasant Harbor Master Plan Resort at Black Point shall consist of the properties described below, excluding only that portion of any parcel lying westerly of US 101, and together with DNR leased tidelands supporting the Pleasant Harbor Marina.

PARCEL A:

The Northeast 1/4 of the Southwest 1/4 of Section 15, Township 25 North, Range 2 West, W.M., in Jefferson County, Washington;

TOGETHER WITH a perpetual non-exclusive ^X easement for road and utility purposes through, across and over the following described property:

Beginning at the Southeast corner of the Southwest 1/4 of the Northwest 1/4 of said Section 15;
thence run West, along the South line of said Southwest 1/4 of the Northwest 1/4, approximately 175 feet to the Southerly line of Black Point County Road;
thence Northeasterly, along said Southerly line, to a point 30 feet North of said South line when measured at right angles;
thence East, parallel to said South line, to the East line of said Southwest 1/4 of the Northwest 1/4;
thence South 30 feet to the point of beginning;

AND over and across the West 30 feet of the South 30 feet of Government Lot 4 in said Section 15.

Situate in the County of Jefferson, State of Washington.

PARCEL B:

The East 1/2 of the Northwest 1/4 of the Southwest 1/4 of Section 15, Township 25 North, Range 2 West, W.M., in Jefferson County, Washington;

EXCEPT that portion thereof, lying within a strip of land conveyed to the State of Washington, for State Road No. 9, Duckabush River-North Section, by deed dated August 28, 1933, and recorded under Auditor's File No. 70817, records of Jefferson County, Washington.

Situate in the County of Jefferson, State of Washington.

PARCEL C:

Those portions of Sections 15 and 22, both in Township 25 North, Range 2 West, W.M., Jefferson County, Washington, described as follows:

The Southwest 1/4 of the Southeast 1/4 and Government Lot 7 of said Section 15, and Government Lots 2 and 3 of said Section 22;

EXCEPT those portions thereof lying East of the West line of the East 695.00 feet of said Southwest 1/4 of the Southeast 1/4, and East of the Southerly prolongation of said West line;

ALSO EXCEPT that portion of the West 100.00 feet of said Government Lot 7, lying Southerly of the North 539.00 feet thereof.

TOGETHER WITH tidelands of the Second Class, as conveyed by the State of Washington, situate in front of, adjacent to and abutting upon the West 1/2 in width of said Government Lot 2, in said Section 22.

Situate in the County of Jefferson, State of Washington.

PARCEL D:

That portion of the Northwest 1/4 of the Southeast 1/4 in Section 15, Township 25 North, Range 2 West W.M., lying Southerly of the Black Point Road as conveyed to Jefferson County by deed recorded under Auditor's File Nos 223427, records of said County;

EXCEPT that portion described as follows:

That portion of the Northwest 1/4 of the Southeast 1/4 of Section 15, Township 25 North, Range 2 West, W.M., described as follows:

Beginning at the point of intersection of the East line of the Northwest 1/4 of the Southeast 1/4 and the Southerly margin of the Black Point Road;
thence South along the said East line, a distance of 300 feet;
thence West 350 feet;
thence North to the Point of intersection with the Southerly margin of the Black Point Road;
thence Easterly along said Southerly margin to the Point of Beginning.

Situate in the County of Jefferson, State of Washington.

PARCEL E:

That portion of the Southwest 1/4 of the Northwest 1/4 of Section 15, Township 25 North, Range 2 West, W.M., as follows:

A strip of land 250 feet wide lying Easterly of and parallel to the Southeasterly right-of-way of State Highway 101;

EXCEPT the right of way for Black Point Road as conveyed to Jefferson County by deed recorded under Auditor's File No. 223427 and 410339, records of Jefferson County, Washington.

ALSO EXCEPTING THEREFROM the following described tract:

Beginning at the Southwest corner of Government Lot 3;
thence North 88° 23' 07" West 308.14 feet to the Southeasterly right-of-way of State Highway No. 101, and the TRUE POINT OF BEGINNING;
thence Southwesterly along said Highway, 117 feet,
thence South 88° 23' 07" East, to a point 175 feet West of the high tide line;
thence Northeasterly to a point on the North line of the Southwest 1/4 of the Northwest 1/4, 100 feet West of said high tide line;
thence North 88° 23' 07" West to the TRUE POINT OF BEGINNING of this exception.

Situate in the County of Jefferson, State of Washington.

PARCEL F:

Lot 1 of Watertouch Short Plat, as recorded in Volume 2 of Short Plats, pages 205 and 206, records of Jefferson County, Washington, being a portion of Section 15, Township 25 North, Range 2 West, W.M., Jefferson County, Washington.

Situate in the County of Jefferson, State of Washington.

PARCEL G:

Lot 2 of Watertouch Short Plat, as recorded in Volume 2 of Short Plats, pages 205 and 206, records of Jefferson County, Washington, being a portion of Section 15, Township 25 North, Range 2 West, W.M., Jefferson County, Washington.

Situate in the County of Jefferson, State of Washington.

PARCEL H:

Lot 3 of Watertouch Short Plat, as recorded in Volume 2 of Short Plats, pages 205 and 206, records of Jefferson County, Washington, being a portion of Section 15, Township 25 North, Range 2 West, W.M., Jefferson County, Washington.

Situate in the County of Jefferson, State of Washington.

PARCEL I:

Lot 1, Pleasant Harbor Marina Short Plat, as per plat recorded in Volume 2 of Short Plats, pages 221 to 223 and amended in Volume 3 of Short Plats, pages 8 to 10, records of Jefferson County, Washington, EXCEPT that portion of lot 1 described as follows:

That portion of Government Lot 3 abutting 2nd class tidelands in Section 15, Township 25 North, Range 2 West, W.M., Jefferson County, Washington, being more particularly described as follows:

Commencing at the North 1/4 corner of Section 15, Township 25 North, Range 2 West, W.M., Jefferson County, Washington;
thence South 88° 13' 42" East along the North line of said Section 15 for a distance of 364.50 feet to the point of beginning;
thence continuing South 88° 13' 42" East 238.76 feet to the line of mean high tide;
thence South 61° 12' 00" West along the line of mean high tide 34.78 feet;
thence North 40° 41' 54" West along the line of mean high tide 3.31 feet;
thence South 62° 36' 19" West along the line of mean high tide 26.83 feet;
thence South 87° 54' 36" West 166.65 feet;
thence North 21° 21' 05" West 43.00 feet to the point of beginning.

AND ALSO EXCEPTING Second Class tideland as conveyed by the State of Washington, in front of, adjacent to and abutting the above described excepted uplands.

Situate in the County of Jefferson, State of Washington.

PARCEL J: 50215202

Lot 2, Pleasant Harbor Marina Short Plat, as per plat recorded in Volume 2 of Short Plats, pages 221 through 223, and amended in Volume 3 of Short Plats, pages 8 through 10, records of Jefferson County, Washington.

TOGETHER WITH second class tidelands, as conveyed by the State of Washington, situate in front of, adjacent to and abutting thereon.

Situate in the County of Jefferson, State of Washington.

PARCEL K: 502153020 BROWN

Those portions of the Southwest 1/4 of the Southeast 1/4 of Section 15, and Government Lot 2 of Section 22, both in Township 25 North, Range 2 West, W.M., Jefferson County, Washington, described as follows:

The East 345.00 feet of said Southwest 1/4 of the Southeast 1/4, as measured along the North line thereof;

TOGETHER WITH that portion of said Government Lot 2 lying East of the Southerly prolongation of the West line of said East 345.00 feet;

Situate in the County of Jefferson, State of Washington.

PARCEL L: 502153021 JOAN MARKE

Those portions of the Southwest 1/4 of the Southeast 1/4 of Section 15, and Government Lot 2 of Section 22, both in Township 25 North, Range 2 West, W.M., Jefferson County, Washington, described as follows:

The East 520.00 feet less the East 345.00 feet of said Southwest 1/4 of the Southeast 1/4, as measured along the North line thereof.

TOGETHER WITH that portion of said Government Lot 2 lying East of the Southerly prolongation of the West line of said East 520.00 feet and West of the Southerly prolongation of the East line of said East 345.00 feet.

Situate in the County of Jefferson, State of Washington.

PARCEL M: 502153022 CHARLES MANKE

Those portions of the Southwest 1/4 of the Southeast 1/4 of Section 15, and Government Lot 2 of Section 22, both in Township 25 North, Range 2 West, W.M., Jefferson Ocutny, Washington, described as follows:

The East 695.00 feet less the East 520.00 feet of said Southwest 1/4 of the Southeast 1/4, as measured along the North line thereof.

TOGETHER WITH that portion of said Government Lot 2 lying East of the Southerly prolongation of the West line of said East 695.00 feet and West of the Southerly prolongation of the East line of said East 520.00 feet.

Situate in the County of Jefferson, State of Washington.

Parcel N: 502152017

Lot 4 of Watertouch Short Plat, as recorded in Volume 2 of Short Plats, pages 205 and 206, records of Jefferson County, Washington, being a portion of Section 15, Township 25 North, Range 2 West, W.M., Jefferson County, Washington.

Records examined to February 10, 2006, at 8:00 A.M.

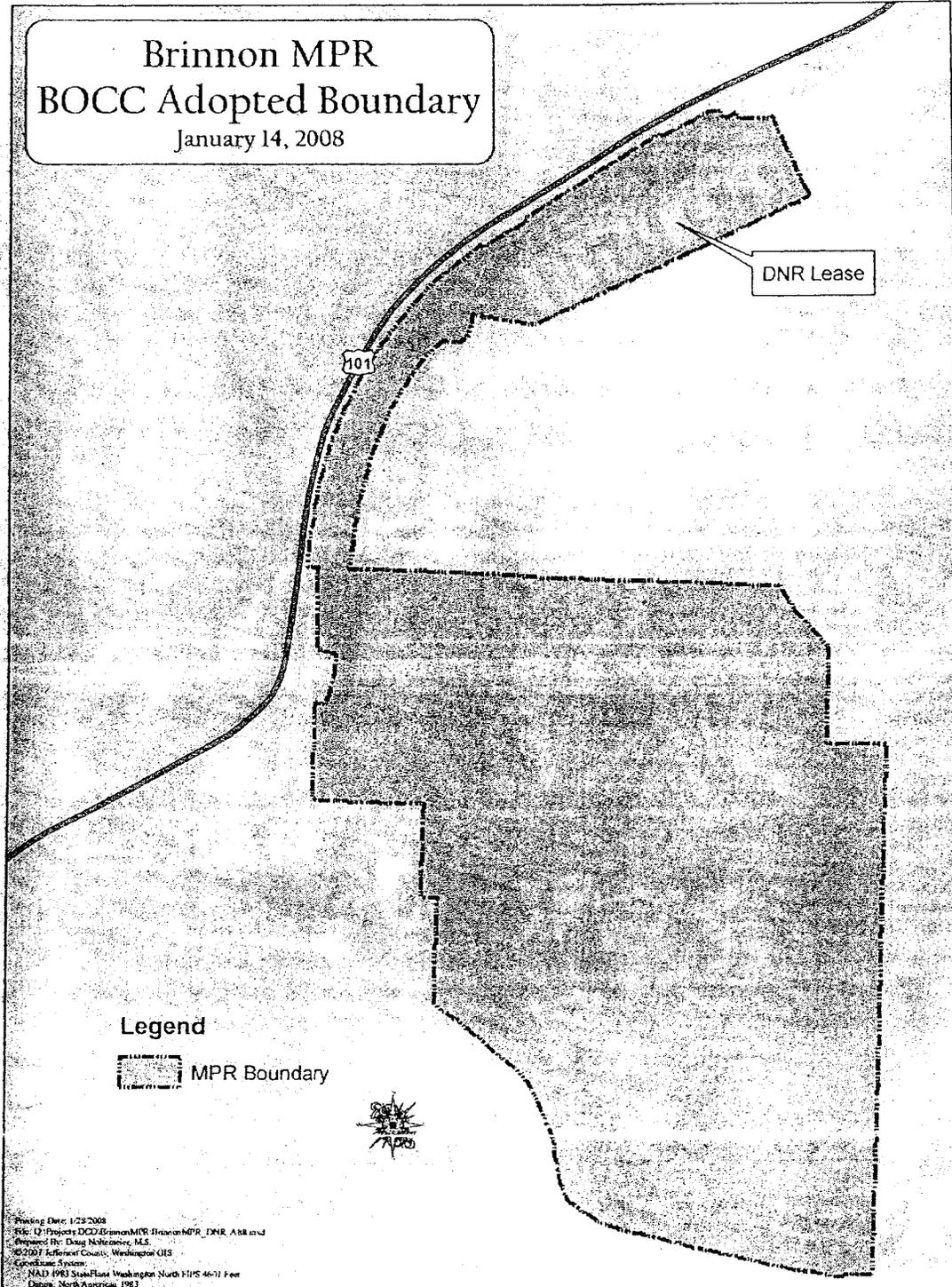
Ordinance Number: 01-0128-08

Exhibit B

MLA06-87 Map: BoCC-Adopted Boundary, Brinnon MPR

001002

Brinnon MPR
BOCC Adopted Boundary
January 14, 2008



Legend
[Dashed Line] MPR Boundary



Printing Date: 1/23/2008
File: J:\Projects\DCD\BrinnonMPR\BrinnonMPR_DNR_Atlas.mxd
Prepared By: Doug Niekiewicz, MS
302007 Jefferson County, West Virginia GIS
Coordinate System:
NAD 1983 StatePlane West Virginia North FIPS 46-3 Feet
Datum: North American 1983
DISCLAIMER: Jefferson County does not attest to the accuracy
of the data contained herein and makes no warranty,
with respect to its correctness or validity. Data contained
in this map is limited by the method and accuracy of its collection.

0 250 500 1,000 Feet
[Scale bar]

Figure 8

001003 14-4



JEFFERSON COUNTY

PLANNING COMMISSION

621 Sheridan Street

Port Townsend, WA 98368

(360) 379-4450

Planning Commission Recommendations: 2007 Comprehensive Plan Amendment Application: MLA06-87

MLA06-87; Statesman Group Master Planned Resort at Black Point in Brinnon.

The Board of County Commissioners placed the Brinnon Area MPR site-specific Comprehensive Plan amendment on the 2007 Final Docket. This proposed MPR rezone of 256 acres on Black Point in Brinnon would create 890 units of permanent and transient housing, an 18 hole golf course, and commercial space along the marina and at the golf course.

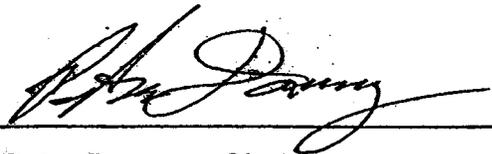
The Planning Commission appointed four members and one alternate to a committee to review the proposal, address issues and concerns and make a recommendation to the full Planning Commission. That committee voted to approve the proposal (3-1) with conditions. The Planning Commission held one public hearing in Brinnon specifically on this proposal. Approximately 30 people testified both in support and against the proposal. Additionally more than 300 written responses were received. Responses in favor of the proposal cited economic development, environmental stewardship of the proponent and quality of life as reasons for supporting the proposal. Responses against the proposal cited inaccurate rainfall data used in developing the water supply and water treatment plans, concerns about water supply, concerns about adjacent shellfish beds to the south of the proposed development, concerns about tribal cultural and historical resources, concerns about the potential for saltwater intrusion into the aquifer, concerns about effects on the rural nature of the community, concerns about induced traffic, concerns about the infrastructure needed to support the project and concerns about effects on the shoreline and water quality of Hood Canal.

After extensive review of the criteria needed to make the decision and whether or not the proposal was consistent with the Jefferson County Comprehensive Plan, the Planning Commission found that the proposal is consistent with the Comprehensive Plan and voted (7-2) to recommend approval of the proposal with the following conditions:

- 1) ensuring that the EIS is based on science and data pertinent to the Brinnon site. This includes rainfall projections, runoff projections and potential impacts on Hood Canal.
- 2) negotiating with the developer to provide needed support for the Brinnon school, district, and Emergency Medical Services (EMS).

Ex #9-3
001550

- 3) requiring the developer to prioritize the sourcing of labor and construction materials from within Jefferson County.
- 4) examining the possible ecological impact of the development's water plan that alters kettles for use as water storage.
- 5) consulting with tribes regarding cultural resources.
- 6) ensuring that natural greenbelts will be maintained on U.S. Highway 101 and as appropriate on the shoreline.
- 7) Further, more detailed review is needed at the project level SEPA analysis to ensure that water quantity and water quality issues are addressed. If the plan proves to be inadequate at the project level, the county commissioners should consider altering the size as a way to mitigate water quality and water quantity impacts.



Peter Downey, Chairman
Jefferson County Planning Commission

11-28-07

Date



JEFFERSON COUNTY

PLANNING COMMISSION

621 Sheridan Street
Port Townsend, WA 98368
(360) 379-4450

Planning Commission Minority Report 2007 Comprehensive Plan Amendment Application: MLA06-87

We, as a minority of the Planning Commission, believe that Statesman's plan as detailed in MLA06-87 DEIS is inadequate. Still, we agree that Statesman's plans for the Master Planned Resort (MPR) be allowed, but only with the seven (7) conditions approved by the majority and, in addition, the three (3) conditions listed below:

- That in keeping with an MPR designation as located in a setting of natural amenities, and in order to satisfy the requirements of the Shoreline Master Program (JCC 18.15.135 (1), (2), (6), the greenbelts at the shoreline be retained and maintained as they currently exist in order to provide for "the screening of facilities and amenities so that all uses within the MPR are harmonious with each other, and in order to incorporate and retain, as much as feasible, the preservation of natural features, historic sites, and public views."
- That in keeping with an approved landscaping and grading plan, and in order to satisfy the intent of JCC 18.15.135 (6), the buildings be built and placed in such a way that they will blend into the terrain and landscape with parklike greenbelts between the buildings.
- In fostering the economy of South County by promoting tourism, that the housing units at the Marina Village be limited to rentals and time share; or, at the very least, it should be mandated that each section be required to keep the 65% to 35% ratio of rental & time-shares to permanent residences per JCC 18.15.123 (2).

Thus, we, the minority, recommend the following:

That the Statesman's plan for the Master Plan Resort (MLA06-87) be approved *only* if a total of ten (10) conditions be placed on approval, i.e., the seven (7) Planning Commission majority conditions found in the majority report, and the three (3) Planning Commission minority conditions specified above.

Ex. #9-4
001552

As a minority of the vote taken on November 14, 2007, on MLA06-87 (Brinnon Master Plan Resort) we, JD Gallant and Ashley Bullitt, hereby submit this Minority Report to the Jefferson County Board of Commissioners.



JD Gallant, Planning Commissioner
(Signing for and with the approval of Ashley Bullitt.)

11-28-07

Date

COMA

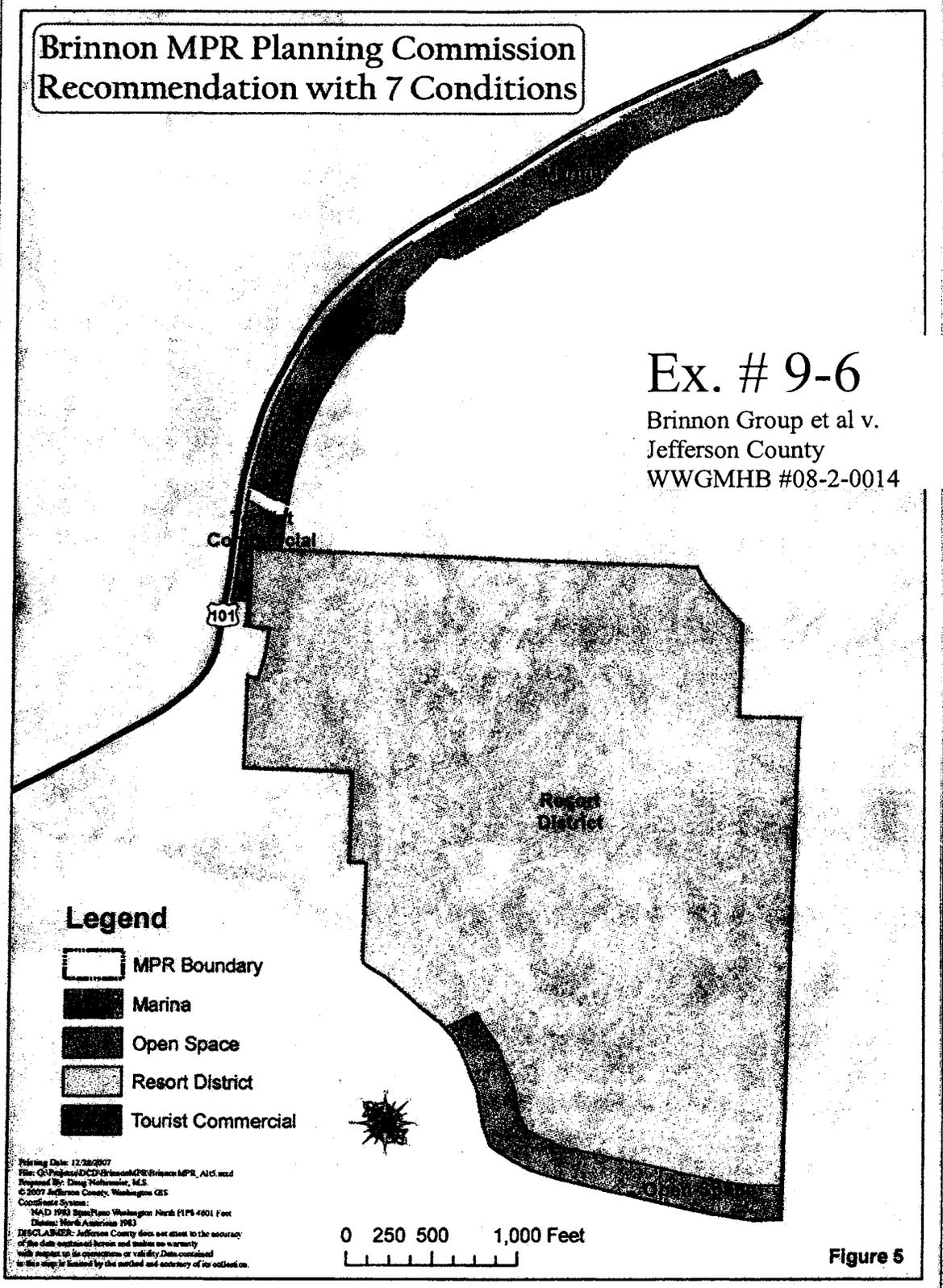
a18b

2575-7

**Brinnon MPR Planning Commission
Recommendation with 7 Conditions**

Ex. # 9-6

Brinnon Group et al v.
Jefferson County
WWGMHB #08-2-0014



Legend

-  MPR Boundary
-  Marina
-  Open Space
-  Resort District
-  Tourist Commercial

Printing Date: 12/28/2007
 File: G:\Projects\DCD\BrinnonMPR\Brinnon MPR_A15.mxd
 Prepared By: Doug Mathews, M.S.
 © 2007 Jefferson County, Washington GIS
 Coordinate System:
 NAD 1983 StatePlane Washington North (119 4601 Feet)
 Datum: North American 1983
 DISCLAIMER: Jefferson County does not attest to the accuracy
 of the data contained herein and makes no warranty
 with respect to its completeness or validity. Data contained
 in this map is limited by the method and accuracy of its collection.

0 250 500 1,000 Feet

Figure 5

Bob Dancy 1-8-08

James Orr, Secretary 1-8-08
001354

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 BRINNON GROUP and BRINNON MPR
4 OPPOSITION,

Case No. 08-2-0014

5 Petitioners,

FINAL DECISION AND ORDER

6 v.

7
8 JEFFERSON COUNTY,

9 Respondent,

10 And

11 PLEASANT HARBOR,

12 Intervenor.
13
14
15

16
17 **I. SYNOPSIS OF DECISION**

18 In this Order the Board finds that the process employed by Jefferson County to adopt
19 a comprehensive plan amendment authorizing a proposed Master Planned Resort map,
20 legal description and text amendment for the Brinnon Master Planned Resort complied with
21 the Growth Management Act's public participation requirements, as well as the process
22 required under the Jefferson County Code. In addition, the Board finds in this Order that
23 Petitioners have failed to demonstrate that any of the challenged aspects of the Brinnon
24 MPR create an inconsistency such that one feature of the Jefferson County plan is
25 incompatible with any other feature of its plan or regulation. The Board also finds that
26 Petitioners have not demonstrated that the adoption of the Ordinance and environmental
27 review fails to comply with the substantive and procedural requirements of Chapter 43.21C
28 RCW including implementing regulations in Chapter 197-11 WAC and JCC 18.40.700 et.
29 seq. including the procedural requirement for consideration of alternatives in the EIS. As the
30 Board has not found any area of noncompliance, there is no basis for a finding of invalidity.
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002607

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II. PROCEDURAL HISTORY

The Petition for Review in this case was filed on March 19, 2008. Pleasant Harbor Marina, LLC (Pleasant Harbor) was granted Intervenor status on April 22, 2008. The Hearing on the Merits was held on August 25, 2008 in Port Townsend, Washington. Petitioners were represented by Gerald Steel. Respondent was represented by David Alvarez. Intervenor was represented by Sandy Mackie. All three Board members were present, with Board member McNamara presiding.

III. PRELIMINARY MATTERS

Intervenor filed motions to supplement the record on July 18, 2008¹ and August 19, 2008. In the July 18th Motion, Intervenor seeks to add Proposed Exhibits 7-250 through 7-254 to the record. These exhibits are recordings of the Master Planned Resort (MPR) workshops held on 9/11/07, 9/18/07, 9/25/07 and recordings of the proceedings before the Planning Commission on 10/3/07 and 10/31/07.² Pleasant Harbor also seeks to add Proposed Index #5-105, 16-190, and 16-191 which are documents provided on the County's public webpage regarding the proposal as part of the County's notification procedures.³

Intervenor's August 19th motion seeks to add the Appendices to the Draft Environmental Impact Statement (DEIS), Index No. 20-433 and Public Comments Log 1 and 2 of the Final Environmental Impact Statement, Index No. 20-571.

Petitioners cite three grounds for opposing the motions: (1) the DEIS Appendices and Pubic Comment Log are not necessary because Petitioners' substantive comments are already in the record; (2) the documents are unnecessarily large; (3) the motions were not filed with the Board by the due date set out in the Amended Pre-Hearing Order; and, (4)

¹ Due to the illness of Petitioners' attorney the Board elected to not address this motion within the customary twenty days.

² Motion to Supplement the Record at 1.

³ Id.

1 Intervenor has not demonstrated that the evidence is necessary or will be of substantial
2 assistance to the Board.⁴

3
4 RCW 36.70A.290(4) permits a Board to take additional evidence when the Board finds that
5 it is necessary or will be of substantial assistance to the Board in reaching a decision.

6 In addition, WAC 242-02-540 provides:

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

13 The burden is on the party motioning to supplement the record to sufficiently demonstrate to
14 the Board in its motion "... why the parties believe that the additional evidence would be
15 necessary or of substantial assistance to the Board." Heikkila, Battin & Panesko v. City of
16 Winlock & Cardinal FG Co., WWGMHB No. 04-2-0020c, December 16, 2004 (Order on
17 Motions to Supplement).

18
19 Although Petitioners are correct that the motions to supplement the record were filed after
20 the date set forth for such motions in the pre-hearing order, the Board may take
21 supplemental evidence after that date in accordance with WAC 242-02-540 which provides
22 "A board may order, at any time, that new or supplemental evidence be provided." In this
23 case, it has become clear during the reviewing of the briefing and oral arguments at the
24 Hearing on the Merits that an important issue in this case is the nature of the public
25 participation process associated with this Comprehensive Plan Amendment. Related to that
26 issue is the degree to which the proposal may have changed through the SEPA review
27 process and the Planning Commission hearings to the time the amendment was finally
28 adopted. In that context, the offered exhibits would be of substantial assistance to the Board
29 in reaching its decision.
30
31
32

⁴ Petitioners' Opposition to Motion to Supplement the Record at 1-4.

1 For the foregoing reasons, Intervenor's Motion to supplement the record with proposed
2 Exhibits 7-250, 7-251, 7-252, 7-253, 7-254, 5-105, 16-190, and 16-191, 20-433 and Public
3 Comments Log 1 and 2 of the Final Environmental Impact Statement, Index No. 20-571 is
4 GRANTED.

6 IV. BURDEN OF PROOF

7 For purposes of Board review of the comprehensive plans and development regulations
8 adopted by local government, the GMA establishes three major precepts: a presumption of
9 validity; a "clearly erroneous" standard of review, and; a requirement of deference to the
10 decisions of local government.
11

12 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
13 amendments to them are presumed valid upon adoption:
14

15 Except as provided in subsection (5) of this section, comprehensive plans and
16 development regulations, and amendments thereto, adopted under this chapter are
17 presumed valid upon adoption. RCW 36.70A.320(1).

18 The statute further provides that the standard of review shall be whether the challenged
19 enactments are clearly erroneous:

20 The board shall find compliance unless it determines that the action by the state
21 agency, county, or city is clearly erroneous in view of the entire record before the
22 board and in light of the goals and requirements of this chapter. RCW 36.70A.320(3)

23 In order to find the County's action clearly erroneous, the Board must be "left with the firm
24 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
25 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
26

27 Within the framework of state goals and requirements, the boards must grant deference to
28 local government in how they plan for growth:
29

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

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

6 In sum, the burden is on the Petitioners 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

10 Where not clearly erroneous and thus within the framework of state goals and requirements,
11 the planning choices of local government must be granted deference.
12

13 V. DISCUSSION

14 *Issue No. 1:* Whether the adoption of the Ordinance was in compliance with the public
15 participation provisions under the GMA (RCW 36.70A.035, -.130(1)(d), -140 (as required by
16 -.070 (preamble)) and JCC 18.45.010(2), -.060(4)(c), -.080(1)(b), (1)(c), (2)(b), (2)(c), and
17 18.15.132(1)) regarding ineffective and/or untimely notice and lack of effective opportunity
18 for public comment all both for CP text, map amendment, and conditions all both before the
19 Planning Commission and the BOCC; for inadequate Planning Commission Findings,
20 Conclusions, and Recommendations not allowing preparation for BOCC hearing; for not
21 having Planning Commission recommendations timely available before BOCC public
22 hearing; for not having timely Planning Commission signed map and text sufficiently before
23 BOCC public hearing; for considering amendments to Richards' property and DNR lease
24 that were not docketed; for inadequate BOCC Findings and Conclusions, for allowing email
25 comments without notice that ensures knowledge if comments were received?

25 A fundamental requirement of the GMA is that the local jurisdiction provide "early and
26 continuous public participation in the development and amendment of comprehensive land
27 use plans and development regulations implementing such plans."⁵ RCW 36.70A.140
28 requires the following of cities and counties planning according to the GMA (in pertinent
29 part):
30
31
32

⁵ RCW 36.70A.140

1 Each county and city that is required or chooses to plan under RCW 36.70A.040 shall
2 establish and broadly disseminate to the public a public participation program
3 identifying procedures providing for early and continuous public participation in the
4 development and amendment of comprehensive land use plans and development
5 regulations implementing such plans. The procedures shall provide for broad
6 dissemination of proposals and alternatives, opportunity for written comments, public
7 meetings after effective notice, provision for open discussion, communication
8 programs, information services, and consideration of and response to public
9 comments... Errors in exact compliance with the established program and procedures
shall not render the comprehensive land use plan or development regulations invalid
if the spirit of the program and procedures is observed.

10 Additionally, RCW 36.70A.035 mandates that the public participation requirements of the
11 Act shall include "notice procedures that are reasonably calculated to provide notice" to the
12 public, but does not dictate any particular procedures that must be adhered to in a public
13 participation program.

14
15 RCW 36.70A.070 requires that comprehensive plan amendments be adopted with public
16 participation as provided by RCW 36.70A.140.

17
18 JCC 18.45.010(2) requires that Jefferson County comprehensive plan amendments be
19 adopted with public participation similar to the requirements of RCW 36.70A.140.

20
21 With these requirements in mind, the Board will consider Petitioners' public participation
22 challenges and the County and Intervenor's responses.

23
24
25 *A. Text Amendment*

26 Petitioners point out that the Brinnon Master Planned Resort (MPR) Comprehensive Plan
27 Amendment includes a new paragraph of text to be inserted on page 3-23 of the Plan.⁶
28 That text, Section 2 of Ordinance 01-0128-08, describes the number of acres and units of
29 the Brinnon MPR. Petitioners argue this language was not in the original Brinnon MPR
30
31
32

⁶ Petitioners' Opening Brief at 4.

1 application, not reviewed by the Planning Commission, and not available for public review
2 until it was adopted by the Board of County Commissioners (BOCC).

3
4 Petitioners assert that the failure to send the new text language back to the Planning
5 Commission was a violation of RCW 36.70.140 and the spirit of the County's public
6 participation program.

7
8 Petitioners argue that the adoption of this text amendment violates RCW 36.70.430, a
9 provision of the Planning Enabling Act that the County has made part of its public
10 participation process and specifically part of the process for approving site specific
11 comprehensive plan amendments such as the Statesman proposal. Compliance with the
12 Planning Enabling Act is a matter outside the Board's jurisdiction. The Growth
13 Management Hearings Boards are invested with jurisdiction to determine whether a state
14 agency, county, or city planning under RCW 36.70A is in compliance with the requirements
15 of that Chapter, Chapter 90.58 RCW as it relates to the adoption of shoreline master
16 programs or amendments thereto, or Chapter 43.21C RCW as it relates to plans,
17 development regulations, or amendments, adopted under RCW 36.70A.040 or Chapter
18 90.58 RCW.⁷ However, Petitioners point to a provision of the County Comprehensive Plan
19 which provides that the process for adopting site specific amendments to the Plan shall
20 incorporate " the procedures contained within Chapter 36.70 RCW and the Jefferson County
21 development regulations..."⁸ While the Board does not have jurisdiction over Chapter
22 36.70 RCW, the Planning Enabling Act, where the County has imposed the requirements of
23 the Planning Enabling Act upon itself as part of its process for adopting site specific plan
24 amendments pursuant to RCW 36.70A.140, the Board has jurisdiction to review whether the
25 County has complied with these provisions as a means of satisfying the GMA's public
26 participation program provisions.
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⁷ RCW 36.70A.280(1)(a).

⁸ Exhibit 12-95-69 to Petitioner's Brief; County Comprehensive Plan at 1-20.

1 The provision of the Planning Enabling Act that Petitioners assert the County violated in this
2 situation is RCW 36.70A.430 which states:

3 When it deems it to be for the public interest, or when it considers a change in
4 the recommendations of the planning agency to be necessary, the board may
5 initiate consideration of a comprehensive plan, or any element or part thereof, or
6 any change in or addition to such plan or recommendation. The board shall first
7 refer the proposed plan, change or addition to the planning agency for a report
8 and recommendation. Before making a report and recommendation, the
9 commission shall hold at least one public hearing on the proposed plan, change
or addition.

10 Petitioners also contend that the County did not give the public an opportunity to comment
11 on the text amendment in violation of JCC 18.45.010(2) which requires "an opportunity for
12 public comment on any proposed amendments".⁹ The map in FEIS and the Planning
13 Commission recommendation adopted in November, 2007 are what was eventually adopted
14 by the County. The record demonstrates that the text amendment at issue did not differ in
15 substance from the site specific plan amendment described in the DEIS and the FEIS and
16 the recommendation of the Planning Commission.¹⁰ The DEIS, the FEIS, and the Planning
17 Commission proposal all include in the project's description the acreage of about 256 acres,
18 a total of 890 residential units at the golf course resort and the marina, an 18 hole golf
19 course, and commercial space at the golf course and the marina. Furthermore, Petitioners
20 did in fact comment on this proposal during the review of DEIS noting that "The project
21 should be downsized from 890 units".¹¹
22
23

24 RCW 36.70.430 does not require the exact wording of the text amendment to be included in
25 the Planning Commission's recommendation. Here, the Planning Commission provided a
26 description of the property included in the MPR and the text amendment does not differ in
27 substance from the proposal. Also, the text amendment does not change the substance of
28 the proposal on which citizens could comment at the Planning Commission and the BOCC
29
30

31
32 ⁹ Petitioners' Opening Brief at 6.

¹⁰ Exhibit 1-9 of the County's Hearing Brief at Exhibit D1. Exhibit 14-100, Ordinance 01-0128-008 at 16,
Exhibit 10-75, Exhibit 20-432 at 1-1 – 1-17, and Exhibit 20-571, at 1-4 to 1-17.

¹¹ Exhibit 8-272-1.

1 hearings. Therefore, the Board finds that the adoption of the text amendment did not
2 violate Jefferson County's process for adopting site specific comprehensive plan
3 amendments and its public participation program.
4

5 **Conclusion:** Petitioners have failed to demonstrate Section 2 of Ordinance 01-0128-08 was
6 adopted in violation of the JCC 18.45.010(2), RCW 36.70A.140, and RCW 36.70A.070.
7

8 **B. 30 Conditions of Approval in Finding 63**

9 Petitioners argue that it was inappropriate for the County to have adopted conditions for the
10 Brinnon MPR that could not be commented upon or reviewed by the public and that there
11 was no authority under the Planning Enabling Act, Chapter 36.70 RCW, or the Growth
12 Management Act, Chapter 36.70A RCW, to do so.¹² Petitioners claim that conditions that
13 are intended to interpret, moderate or control a Comprehensive Plan Amendment must be
14 processed as part of the Plan Amendment, including noticing prior to Planning Commission
15 Hearings.¹³ In this instance, Petitioners point out, the Board of County Commissioners
16 (BOCC) adopted 30 conditions of approval, as part of Finding 63 to Ordinance 01-0128-08,
17 without any hearing on the conditions.
18
19

20 The County responds that the 30 conditions were not placed in the Ordinance as a
21 Comprehensive Plan amendment, but to shape the contours of the subsequent project-level
22 environmental review, the eventual permitting process and the relationship of the MPR to
23 state agencies, tribes and junior taxing districts such as school district's and PUDs.¹⁴ The
24 County argues that the 30 conditions must be seen in the context of the five-step approval
25 process wherein the first step is the designation of the MPR, the second is creation of a
26 development agreement and development regulations, the third is project-level SEPA
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32 ¹² Petitioners' Opening Brief at 8.

¹³ Id.

¹⁴ County's Brief at 18.

1 review, the fourth is platting and completion of infrastructure, and the fifth is issuance of
2 building permits.¹⁵

3
4 The Board notes that Findings 36 and 37 of the Ordinance support this interpretation: that
5 "only a Comprehensive Plan amendment was under consideration, and that the
6 development agreement and zoning code guiding MPR projects will come before it in a
7 subsequent process after the adoption of this CP amendment. A subsequent development
8 agreement and zoning code shall be consistent with this CP amendment."¹⁶

9
10 This described process is consistent with the Jefferson County comprehensive plan which
11 allows the processing of amendments for Master Planned Resorts (MPR) in this
12 sequence.¹⁷ Additionally, the Jefferson County code does not allow for development of
13 MPRs unless specific requirements including provision of adequate infrastructure and
14 protection of critical areas are met.¹⁸

15
16
17 Furthermore, and as confirmed during questioning at the Hearing on the Merits, the
18 conditions of approval contained in Finding 63 reflect the County's response to the specific
19 concerns raised during the public process.

20
21 Of additional relevance to the resolution of this issue is the consideration of the scope of the
22 action under review. As noted, the adoption of the Comprehensive Plan Amendment was
23 but the first step of a five step process that would lead to the development of the Brinnon
24 MPR. It is only this first step that is relevant for purposes of this appeal. In this step, the
25 Planning Commission recommended adoption of the Comprehensive Plan map amendment
26 to apply the Master Planned Resort designation to the lands in question. The Planning
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¹⁵ See, Exhibit No. 16-83.

¹⁶ Ordinance 01-0128-08 at Finding 36.

¹⁷ Jefferson Comprehensive Plan at Policy LNP 24.2. (Jefferson County Plan at 3-65).

¹⁸ JCC at 18.15.126 and 18.15.135.

1 Commission recommended seven conditions of approval. The Board of County
2 Commissioners did not alter that recommendation except to add additional conditions.¹⁹
3
4 Thus, the BOCC did not alter the Planning Commission's recommendation, except in the
5 sense that it reflected additional consideration of public input on how the project should be
6 conditioned *during subsequent phases of approval*. Under JCC 18.45.080(2) the BOCC is
7 obligated to conduct additional public hearings only when it "deems a change in the
8 recommendation of the Planning Commission to be necessary". RCW 36.70.430, adopted
9 as part of the County code for processing site specific comprehensive plan amendments,
10 requires a referral to the Planning Commission for review and hearing, if the BOCC makes a
11 change in the Planning Commission's recommendation. Where, as here, the BOCC
12 accepted the Planning Commission's recommendation regarding the Comprehensive Plan
13 amendment, and went further in adding conditions of approval to apply in later phases of
14 approval, no further public hearing was necessary.
15
16

17 **Conclusion:** Petitioners have failed to demonstrate that adoption of conditions of approval
18 for the Brinnon MPR was a violation of the GMA's or Jefferson County's public participation
19 requirements.
20

21 **C. Map Amendments - Legal Description and Parcel Numbers**

22 Petitioners note that the legal descriptions are included in Ordinance 01-0128-08 for 14
23 parcels, yet the project as noticed by the Planning Commission in its Notice of Hearing
24 describes the project as 13 parcels.²⁰ Petitioners argue there was inadequate notice to the
25 public as to how many parcels were intended to be included in the Map Amendment.
26
27

28 While the County and Intervenor address the discrepancy in terms of whether the 14th
29 parcel was the "Richards' family parcel", Petitioners suggest that this merely demonstrates
30

31
32 ¹⁹ The Board has reviewed the Planning Commission's proposed conditions of approval and finds that they were incorporated into Finding 63's conditions of approval, as summarized in the table on page 20 of the County's hearing brief.

²⁰ Petitioners' Opening Brief at 11.

1 that they do not understand the nature of the discrepancy in the maps, pointing out that the
2 original application included 13 parcels, not including the "Cell D parcel" but including the
3 Richards' family parcel.²¹ The County asserts that the map adopted by Ordinance No. 01-
4 0128-08, included the parcels in the DEIS and FEIS proposals, which Petitioners concede
5 include the Richards' family parcel,²² plus the DNR Lease land.
6

7 The DEIS was issued on September 5, 2007²³ and the FEIS was issued on November 27,
8 2007.²⁴ The DEIS at page 1-13 clearly defines the Maritime Village Subarea as including the
9 "DNR Lease" land within the subarea in Figure 1-13. (Similar material is on page 1-13 of the
10 FEIS). On page 1-17 this area is described as "Marina side – 37+/- acres upland and 15+/-
11 acres tidelands." Both the DEIS and FEIS contain a Figure 1-4 on page 1-3 with a map
12 showing the DNR Lease land within the Brinnon Subarea – Conceptual Master Plan Area
13 Ownership and describe the acreage as 310.6 (325.8 including DNR Lease). At the bottom
14 of the page it states, "The proposed Master Planned Resort is located on the 'Statesman'
15 property (approximately 256 acres) upland and 15.2 acres of DNR marina lease area."
16 The County held three public workshops in Brinnon on September 11, 18 and 25, 2007,²⁵
17 and a public hearing before the Planning Commission on October 3, 2007 to allow the
18 public to address concerns arising from the application and the DEIS. Based on the text and
19 maps in the DEIS, the public would have been able to ascertain that the scope of the
20 proposal included the DNR Lease land. Petitioners have not demonstrated that the notice
21 for the Planning Commission hearing misled the public or caused a public participation
22 violation.
23
24
25

26 Petitioners' arguments that the applicant never had a written agreement with the Richards
27 family and that there is no record of a written agreement with the Department of Natural
28

29
30
31 ²¹ Petitioners' Reply Brief at 17.

32 ²² Id.

²³ Exhibit 20-432.

²⁴ Exhibit 20-571.

²⁵ Exhibits 10-38, 10-45, 10-50 and 10-55.

1 Resources for inclusion of this property within the Brinnon MPR²⁶ are outside the scope of
2 this issue statement. Issue No. 1 asks the Board to consider, *inter alia*, whether the County
3 violated the public participation requirements of the GMA “for considering amendments to
4 Richards’ property and DNR lease that were not docketed”. A failure to obtain such
5 approvals, if such is the case, is not an issue of public participation.
6

7 **Conclusion:** Petitioners have failed to demonstrate there was inadequate notice to the
8 public as to how many parcels were intended to be included in the Map amendment in
9 violation of RCW 36.70A.035.
10

11 *D. Notice of Planning Commission Recommendation*

12 Petitioners allege that there was not effective notice of the Planning Commission’s
13 recommendation regarding the MPR boundary, and suggest that it should have been
14 available ten days prior to the BOCC hearing. Petitioners state that the Planning
15 Commission’s recommendation was first available to the public at the December 3, 2008,
16 public hearing. Petitioners point out that JCC 18.45.010 requires “public meetings after
17 effective notice”.²⁷
18

19
20 The County points out four crucial facts: 1) the proposal for the MPR boundary dated back
21 to at least 2002 and the Brinnon Subarea Plan; 2) the boundary for the reduced MPR
22 proposal had been available for public comment since the publication of the Draft EIS in
23 September 2007; 3) the public comment period for comments to the BOCC was extended to
24 December 7, 2007 because of a snowstorm; and, 4) Petitioners were able to comment on
25 the process as late as January 14, 2008.²⁸ Intervenor points out that the Planning
26 Commission recommendation was completed on November 20, 2007 and forwarded to the
27 BOCC in a memorandum dated November 28, 2007.²⁹ Intervenors note that Petitioners
28
29
30

31 ²⁶ Id.

32 ²⁷ Petitioners’ Opening Brief at 12.

²⁸ County’s Brief at 22.

²⁹ Intervenor’s Brief at 16.

1 were active participants in the review process and make no claim that as of mid-November
2 they were unaware of the Planning Commission's recommendations.³⁰

3
4 While Petitioners assert that they should have had ten days to comment on these
5 recommendations, Jefferson County's code does not provide a timeframe for when the
6 written Planning Commission recommendations should be available to the public. Instead
7 the County's Comprehensive Plan provides that the process for approving site specific plan
8 amendments should include a hearing both before the Planning Commission and the
9 BOCC. The County gave notice of the BOCC December 3, 2007 hearing on November 20,
10 2008. JCC 18.45.080(2)(b) provides that the BOCC will consider the Planning
11 Commission's recommendation on comprehensive plan amendments at a regularly
12 scheduled meeting. These code provisions for comprehensive plan amendments are
13 currently deemed compliant, so any inadequacy of code provisions are not within the
14 Board's purview here.
15
16

17 The County asserts and the record confirms that the Planning Commission finalized its
18 recommendations at its November 20, 2007 meeting. While the County did not have
19 written recommendations available for general distribution until the December 3, 2007 public
20 hearing, the notice for the public hearing on the 2007 comprehensive plan cycle specifically
21 mentions the Brinnon Master Planned Resort. The published notice on November 21, 2008
22 gave contact information for the Community Development Department for persons
23 desiring further information. While this process is less than ideal, interested persons could
24 obtain information about the Planning Commission's recommendation after November 21,
25 2007.³¹
26
27

28 Additionally, the December 3rd hearing was not the Petitioners' only opportunity to comment.
29 Another opportunity was provided for public input on December 6th and written comments
30 were accepted under December 7th. Further, in this instance, the Planning Commission did
31
32

³⁰ Id.

³¹ Exhibit 10-72.

1 not change the proposal that was presented in the DEIS on which the public had numerous
2 opportunities to comment.

3
4 By referring to the fact that the map of the MPR boundary was signed on January 14, 2008,
5 Petitioners appear to suggest they were unaware of the proposed boundary until after the
6 close of the public comment period. While the signed map was not delivered until early
7 January, 2008, it was consistent with the map on page 1-4 in the FEIS in the December 3,
8 2007 staff report that conveyed the Planning Commission's recommendation. This map is
9 also consistent with the map in the DEIS on which the public had opportunities to comment.
10 Therefore, the Board concludes that Petitioners have not shown that they were deprived of
11 "effective notice" by not having the signed map available at the December 3, 2007, BOCC
12 public hearing.
13

14
15 **Conclusion:** Based on the foregoing and in light of the entire record, Petitioners have not
16 carried their burden of proof in regards to their allegations that they were deprived of
17 "effective notice" of the Planning Commission's recommendations or that the County failed
18 to comply with JCC 18.45.010 and RCW 36.70A.035.
19

20 *E. Planning Commission Findings*

21 Petitioners argue that the County failed to comply with JCC 18.45.080(1)(b) and (c) in that
22 its recommendation of approval is without any of the required findings.³²
23

24 Petitioners appear to suggest, by the reference to the Planning Commission's written
25 recommendation at Exhibit 16-205-6 and -7, that the findings were required to have been
26 made in writing. In fact, JCC 18.45.080(1)(b) and (c) contain no requirement for written
27 findings. Instead, it is apparent that the Planning Commission addressed the findings
28 required by JCC 18.45.080(1)(b) and (c) in oral findings, as reflected in its minutes.³³
29
30
31

32

³² Petitioners' Opening Brief at 12.

³³ Exhibit 7-28 and 7-32.

1 JCC 18.45.080(1)(b)(i), (ii) and (iii) require findings regarding changed circumstances,
2 assumptions, and values of Jefferson County residents. Here, the record reflects that there
3 was no consensus on "changed circumstances"; that the Planning Commission found that
4 "assumptions of the Comprehensive Plan are not all valid", and; that as to countywide
5 attitudes, values within the Comprehensive Plan, the Planning Commission was "in
6 support".³⁴
7

8 As to findings required by JCC 18.45.080(1)(c)(i), the Planning Commission did not propose
9 findings with regard to site specific concurrency. When it resumed deliberations on the
10 proposal on November 14, 2007, the record reflects that it addressed the findings required
11 by JCC 18.45.080(1)(c)(ii) – (viii). The Planning Commission voted on and accepted all
12 findings except (vii), the adequacy or availability of urban facilities, which it found to be non-
13 applicable.³⁵
14
15

16 While the Planning Commission did not reach consensus on specific findings regarding
17 changed circumstances, JCC 18.45.080(1)(b) does not require the Planning Commission to
18 make a finding of changed circumstances, but rather that they "consider" such. The record
19 reflects this consideration did occur. JCC 18.45.080(1)(c) on the other hand does not refer
20 to mere "consideration" but requires specific findings. However, in light of the nature and
21 early stage of this approval it is reasonable to conclude that the Planning Commission could
22 not make findings regarding whether this proposal meets concurrency requirements and
23 "does not adversely affect levels of service standards for other public facilities and services."
24 The Planning Commission then accepted by consensus that "The proposed amendment is
25 consistent with the Growth Management Act, Chapter 36.70A,RCW, the County-wide
26 Planning Policy for Jefferson County, and any other applicable inter-jurisdictional policies or
27 agreements, and any other local, state or federal laws."³⁶
28
29
30
31

32 ³⁴ Exhibit 28.

³⁵ Exhibit 7-32, at 3.

³⁶ Id.

002622

1 Thus, the record reflects that contrary to Petitioners' allegation that "The Planning
2 Commission recommendation of approval is without any of the required findings necessary
3 for such a recommendation of approval"³⁷, the Planning Commission made all applicable
4 findings and substantially complied with JCC 18.45.080(1)(b) and (c).

5
6 **Conclusion:** The Planning Commission made all applicable findings and substantially
7 complied with JCC 18.45.080(1)(b) and (c).
8

9 *F. Signed Map*

10 Petitioners claim that the County did not have the required map from the Planning
11 Commission as required by RCW 36.70.400 which they claim is required as part of the
12 County's public participation program.³⁸ The County asserts that although the County's
13 Comprehensive Plan may mention the Planning Enabling Act, that does not extend or alter
14 the Board's jurisdiction. However, as the Board discussed *supra*, the County included the
15 provisions of the Planning Enabling Act in its process for considering site specific
16 comprehensive plan amendments, therefore the Board may review whether the County has
17 satisfied these requirements, as a means of complying with GMA. Further, as Intervenor
18 points out, while the signed map was not delivered to the BOCC hearing, the map showing
19 the Planning Commission's recommendation was referenced in the December 3, 2008 staff
20 report informing the BOCC of the Planning Commission's recommendation. This map is
21 consistent with the signed map. The Petitioners have not shown that the lack of a signed
22 map caused the public to experience confusion over this point.
23
24
25

26 **Conclusion:** While not including a signed map does not fulfill the exact requirement of
27 RCW 36.70.400, as incorporated in the Jefferson County Code, the Board finds that this
28 failure is not one that "renders" this comprehensive plan amendment "invalid" as the County
29 fully described and referred to the FEIS map of the proposal that was consistent with the
30 one eventually adopted. Therefore, in light of the entire record, the Board finds that the
31
32

³⁷ Petitioners' Opening Brief at 12.

³⁸ *Id.* at 13.

1 County did not violate the spirit of its public participation program and finds that the failure
2 to deliver a signed map with the Planning Commission recommendation is not sufficient to
3 find that the County violated RCW 36.70A.140 in the adoption of the Brinnon MPR.
4

5 *G. Failure to Remand Recommendations to Planning Commission*

6 Here, Petitioner again alleges that, pursuant to RCW 36.70.430, if the BOCC wishes to
7 change the Planning Commission recommendation on a Comprehensive Plan Amendment,
8 it must refer the change back to the Planning Commission for an additional public hearing.³⁹
9

10 As discussed *supra*, the County adopted provisions of Chapter 36.70 RCW as part of the
11 process for adopting site specific plan amendments such as the one proposed by
12 Statesman. Also, as discussed *supra*, the Planning Commission did deliver a description of
13 the MPR and clearly referenced the map in the FEIS both of which were consistent with the
14 BOCC's final action. Therefore, because the County did not change the substance of the
15 Planning Commission's recommendation, nothing occurred that required referral to the
16 Planning Commission nor was there a violation of JCC 18.45.020, RCW 36.70A.140, or
17 RCW 36.70A.070.
18
19

20 **Conclusion:** The BOCC accepted the recommendation of the Planning Commission by
21 adopting the map as Exhibit B of Ordinance 01-0128-08 and incorporated the Planning
22 Commission's description of the Brinnon MPR proposal into the text amendment, so no
23 violation of JCC 18.45.010, RCW 36.70A.140, and RCW 36.70A.070 occurred.
24

25 Portions of the Issue Statements not addressed in this Order were not briefed or argued by
26 Petitioner and are deemed abandoned.
27

28
29 **Issue No. 2:** Whether the adoption of the MPR designated by the Ordinance into the
30 Comprehensive Plan (which includes the Brinnon Subarea Plan), the MPR-related
31 Comprehensive Plan amendments, and the Ordinance comply with the provisions of RCW
32 36.70A.360(1) regarding retaining a setting of significant natural amenities and primary

1 focus on short-term visitor accommodations and with a range of recreational facilities, (2)
2 regarding limiting on-site facilities to resort use and preventing shared off-site facilities and
3 utilities from serving any non-urban areas, and regarding application of RCW 90.03 and
4 90.44 for water, (3) regarding other than short-term visitor accommodations being
5 supportive, (4)(b) regarding CP and DR failure to preclude new suburban development
6 outside the MPR, and (4)(e) regarding impacts fully considered and mitigated;
7 36.70A.020(1) regarding inadequate facilities and services, (2) regarding inappropriate
8 conversion to golf course, (5) regarding encouraging growth not within capacity of public
9 services and facilities, (9) regarding conserving fish and wildlife habitat, (10) regarding
10 protecting the surrounding rural environment, (11) for public participation violations, (12)
11 regarding addressing adequate facilities and services before MPR designation, (14)
12 regarding shoreline protection; 36.70A.070(preamble) regarding internal consistency of
13 MPR amendment including with LNG 24.0 and implementing policies (including 24.2
14 regarding CP amendment process evaluating all environmental impacts of all phases and
15 owner must initiate amendment, 24.3 regarding all considered MPR property must be in the
16 initial proposal and no new adjacent suburban development, 24.5 regarding predominantly
17 short-term visitor accommodations, 24.6 regarding requirement that facilities including
18 marina primarily for resort visitors and not local residents, 24.7 requiring urban levels of
19 service, 24.8 requiring facility and service impacts to be fully considered and mitigated, 24.9
20 regarding screening development and defining sufficient areas and types of open space,
21 24.10 regarding environmentally sensitive areas, 24.12 requiring MPR designation to follow
22 development regulations including JCC 18.15.123(2) regarding insufficient short term visitor
23 accommodations, (2) regarding shorelines, (3) regarding phasing, (4) regarding adequate
24 open spaces and sufficient services, (5) regarding adequate services oriented to the MPR,
25 (6) regarding public views and natural features, (7) regarding full consideration and
26 mitigation of impacts, and (8) regarding adverse effects on surroundings, 18.15.135, 18.15
27 and 18.45) and including Subarea Plan and LNP 25.2 regarding preserving natural drainage
28 systems, and failure to update Subarea Plan before or while adopting MPR, (1) regarding
29 general location and extent of uses, population densities, building intensities and population
30 growth for MPR with no current limits on commercial development or on residential unit or
31 building areas or heights, regarding protection for public water supplies, regarding analysis
32 with valid rainfall statistics and guidance for avoiding water pollution; (6)(a)(iii) considering
the MPR; 36.70A.110(4) regarding urban services provided to MPR in manner that does not
provide such service to rural area; 36.70A.110(2) and 36.70A.115 regarding growth
allocation and amended needs and capacity analysis countywide consistent with MPR;
36.70A.120 regarding ordinance consistency with CP, 36.70A.210(1) regarding consistency
with CPPs, 36.70A.480 regarding shoreline protection, and generally by failing to have
goals and policies adopted with the MPR CP amendment that define how this MPR will
meet these GMA requirements to give direction for the adoption of implementing
development regulations and a development agreement both only reviewable under RCW
36.70C?

1 Alleged Internal Inconsistencies – Brinnon Subarea Plan

2 RCW 36.70A. 070 requires (in pertinent part):

3 ...The plan shall be an internally consistent document and all elements shall be
4 consistent with the future land use map...

5 Before beginning this discussion of alleged inconsistencies, it should be noted that not
6 every area of vagueness or ambiguity in a comprehensive plan rises to the level of an
7 internal inconsistency within the meaning of the preamble of RCW 36.70A.070.

8 Consistency means that no feature of the plan or regulation is incompatible with any other
9 feature of the plan or regulation; no feature of one plan may preclude achievement of any
10 other feature of that plan or any other plan.⁴⁰ Also see WAC 365-195-500.

11
12
13 *A. Conceptual MPR*

14 Petitioners allege that the Brinnon MPR cannot be “conceptual” in the Brinnon Subarea Plan
15 and “adopted” in the Comprehensive Plan.⁴¹ However, the Brinnon Subarea Plan map
16 shows a conceptual area within which a master-planned resort may be located. The
17 Statesman proposal is located within that area but does not include certain properties such
18 as the second marina, nor the Tudor and Jupiter properties.⁴² The County confirmed at oral
19 argument that portions of the conceptual area still remain outside the Statesman proposal.
20 Therefore, portions of the “conceptual” Brinnon MPR area remain as yet unadopted.
21 Petitioners have failed to demonstrate a lack of GMA compliance in this regard.
22
23

24 **Conclusion:** Petitioners have not demonstrated that an inconsistency in the Brinnon
25 Subarea Plan associated with describing the Brinnon MPR as “conceptual” will preclude the
26 achievement of any other feature of that plan.
27

28 *A. Rural Residential Designation*
29
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31

32 ⁴⁰ Camp Nooksack Association v. City of Nooksack, WWGMHB No. 03-2-0002 (FDO, 7/11/03)

⁴¹ Petitioners’ Opening Brief at 15.

⁴² See index number 20 -- 571, page 1-3.

1 Petitioners note that map BR- 3 in the subarea plan still shows a Rural Residential (RR)
2 designation while the Comprehensive Plan map includes the Brinnon MPR designation.⁴³
3 As illustrated in Exhibit 16 -- 83, the County intends to employ a phased process wherein
4 zoning changes will be approved subsequent to the approval of comprehensive plan
5 amendments. Modification of map BR -- 3 will be made during the second phase. Thus the
6 Board does not find an internal inconsistency that would preclude achievement of the
7 remainder of the plan.
8

9 **Conclusion:** Petitioners have not demonstrated an inconsistency in the Brinnon Subarea
10 Plan associated with map BR- 3.
11

12 *B. Policy 3.0*

13 Petitioners allege that the designation of such a large MPR at Black Point is internally
14 inconsistent with Brinnon Flats continuing to develop as the main commercial and
15 community center of the Brinnon area as provided by Policy 3.0.⁴⁴ Petitioners' focus on the
16 60,000 sq.ft. scale of the commercial area within the MPR is misplaced. The FEIS
17 describes the commercial facilities as including a restaurant, conference center, and spa all
18 of which are intended to serve the resort.⁴⁵ Petitioners have not demonstrated that these
19 facilities would supplant the commercial and community facilities in Brinnon Flats.
20
21

22 There has been no showing that this aspect of the plan is inconsistent with policy 3.0 and
23 thereby creates an internal inconsistency.
24

25 **Conclusion:** Petitioners have not demonstrated an inconsistency in the Brinnon Subarea
26 Plan associated with Policy 3.0.
27

28 *C. LNP 24.3*
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32 ⁴³ Petitioners' Opening Brief at 16.

⁴⁴ Petitioners Opening Brief at 16.

⁴⁵ Ex. 20-571, FEIS at 1-6.

002627

1 Petitioners allege that the failure of the County to further limit suburban development in the
2 "potential strip mall" outside the Brinnon MPR on Highway 101 conflicts with LNP 24.3.

3 LNP 24.3 provides:

4 The process for siting a master planned resort and obtaining the necessary
5 Comprehensive Plan designation shall include all property proposed to be
6 included within the MPR and shall further include a review of the adjacent
7 Comprehensive Plan land use designations/districts to ensure that the
8 designation of a master planned resort does not allow new urban or suburban
9 land uses in the vicinity of the MPR. This policy should not be interpreted,
10 however, to prohibit locating a master planned resort within or adjacent to an
11 existing Urban Growth Area or within or adjacent to an existing area of more
12 intense rural development, such as an existing Rural Village Center or an
13 existing Rural Crossroad designation.

13 Petitioners assert that this policy requires the County, when establishing an MPR land use
14 designation, to ensure that it does not allow urban or suburban development in the vicinity
15 of the MPR.⁴⁶ Petitioners also argue that the County's action further violates RCW
16 36.70A.360(4)(b) which requires that the comprehensive plan and development regulations
17 preclude new urban or suburban land uses in the vicinity of the Master Planned Resort.

18 Petitioners suggest that the Subarea Plan must be amended to clarify that no new urban or
19 suburban development will be allowed outside the current adopted Brinnon MPR.
20

21
22 Both LNP 24.3 and RCW 36.70A.360(4)(b) prohibit "new urban or suburban land uses in the
23 vicinity of the MPR". Petitioner relies upon the FEIS as evidence that there is pressure for
24 suburban development outside the Brinnon MPR on Highway 101.⁴⁷ However, Petitioners
25 present neither argument nor evidence that development allowed under the County's
26 current UDC would permit such urban or suburban land uses. Rural scale development that
27 is permitted under the County's rural area zoning would not be inconsistent with either LNP
28 24.3 or RCW 36.70A.360(4)(b).
29
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32

⁴⁶ Petitioners' Opening Brief at 17.

⁴⁷ Id.

1 **Conclusion:** Petitioners have not demonstrated an inconsistency in the Brinnon Subarea
2 Plan associated with Policy LNP 24.3

3
4 *D. Failure to Make Site-Specific Findings*

5 Petitioners assert that the County has failed to comply with that provision of the Brinnon
6 Subarea Plan that provides:

7 Actual designation of an MPR district can only be accomplished through
8 a site-specific MPR application consistent with the requirements of the
9 Jefferson County Comprehensive Plan (including the Brinnon Subarea
10 Plan) and the Unified Development Code.⁴⁸

11 Petitioners argue that it is premature to move forward with the designation of the Brinnon
12 MPR because the County has not committed to the scale and intensity of uses proposed by
13 the project, as indicated by the lack of specificity in the text amendment. They further argue
14 that the large number of conditions attached to the Comprehensive Plan Amendment
15 approval show that the County has not decided that the site specific application is consistent
16 with all Plan and Code requirements.⁴⁹

17
18
19 The suggestion that the County has not determined that the site specific application is
20 consistent with the Comprehensive Plan and Subarea Plan is refuted by the findings
21 contained in Ordinance 01-0128-08. The County found:

22
23 34. Step 5: The Board entered an affirmative statement that consistency
24 with the Jefferson County Comprehensive Plan, specifically Land Use
25 Policies 24.1-24.13, has been achieved by the applicant, as each of the
26 pertinent criteria are met by this proposal. . . .

27 35. Step 6. The Board entered an affirmative statement that consistency
28 with the Brinnon Subarea Plan, adopted May 1, 2002, specifically Goals
29 1.0 and Policies 1.1-1.3 is achieved, as each of the pertinent criteria are
30 met by this proposal.
31
32

⁴⁸ See, Ex. 5-3 at 46.

⁴⁹ Petitioners' Opening Brief at 19.

1 The County's findings further illustrate that it was in the midst of a "14 step process for
2 decision-making"⁵⁰ wherein "the development agreement and zoning code guiding MPR
3 projects will come before it in subsequent process after the adoption of this CP
4 amendment."⁵¹
5

6 As noted *supra*, both the County's comprehensive plan and development regulations
7 authorize this process.⁵² The Jefferson County Code includes many of the requirements
8 for MPRs that are detailed in the findings. These requirements include a master plan that
9 must be reviewed and recommended by the Planning Commission and approved by the
10 BOCC. The master plan must, among other specifications, list the allowable uses, densities
11 and intensities, and how they will be distributed; show how the natural amenities of the site
12 will be protected; and document how sufficient services and facilities will be provided and
13 concurrency will be met.⁵³ The Jefferson County Code further requires a development
14 agreement approved by the BOCC that contains development standards for: (1) permitted
15 uses, densities, and intensities; (2) provisions for open space, public access to shorelines,
16 visitor orientated and short term residential accommodations, on-site recreational facilities
17 and retail commercial services; and, (3) mitigation measures required by SEPA.⁵⁴ Finally,
18 MPR development cannot proceed unless it meets certain criteria to ensure consistency
19 with Jefferson County plan and code requirements.⁵⁵ Thus, a determination that the
20 application will be consistent with the Unified Development Code is appropriate at a later
21 stage.
22
23
24

25 **Conclusion:** Petitioners have failed to carry their burden to demonstrate an internal
26 inconsistency because the County has not committed to the scale and intensity of uses
27 proposed by the project.
28

29
30 ⁵⁰ Ex. 14-4 at 4. Finding 29.

31 ⁵¹ Id. at Finding 36.

32 ⁵² LNP. 24.2 and JCC 18.15.126(3).

⁵³ JCC 18.15.126, 18.15.132.

⁵⁴ JCC 18.15.126(2).

⁵⁵ JCC 18.15.135.

1 E. Alleged Inconsistencies with the Conceptual Vision

2 Petitioners' argument that the Brinnon MPR is inconsistent with the Subarea Plan because
3 that Plan envisioned the intensity of the resort would not rival the Brinnon Flats area
4 pursuant to P3.0 has been discussed and rejected above.
5

6 Petitioners assert that because RCW 36.70A.360(1) describes a Master Planned Resort as
7 "a self-contained and fully integrated planned unit development in a setting of significant
8 natural amenities", the Board should find that the requirement of a "setting of significant
9 amenities" means both on and off the project site, and further find that the natural amenities
10 on the site should predominate over the built environment.⁵⁶ Petitioners go so far as to urge
11 the Board to require that the proposal be modified to keep 50% of the best tree-covered
12 lands natural and undisturbed on the site.⁵⁷ Petitioners' reading of RCW 36.70A.360 not
13 only has no support in the GMA, it advocates the type of "bright line tests" rejected by the
14 courts⁵⁸.
15
16

17 Nothing in RCW 36.70A.360(1) suggests that the "setting of significant natural amenities"
18 cannot be located in the surrounding area. In this case, the MPR is located in the vicinity of
19 Hood Canal, the Olympic National Forest, and the Olympic Mountains. The Jefferson
20 County Comprehensive Plan⁵⁹ and the Brinnon Subarea Plan⁶⁰ identify this as an area of
21 natural amenities. Also, while the Jefferson County Code does not include specifications
22 that the Petitioners desire, one of the criterion for the approval of MPRs requires
23 environmental considerations to be employed in a MPR's design to incorporate and retain
24 within the MPR natural features, historic sites, and public views.⁶¹
25
26
27
28

29
30 ⁵⁶ Petitioners' Opening Brief at 20.

31 ⁵⁷ Id. at 21.

32 ⁵⁸ See, Viking Properties v. Holm, 155 Wn2d 112 (2005), Thurston County v. Western Washington Growth
Management Hearings Board, 2008 Wash. LEXIS 812 (2008).

⁵⁹ See, Jefferson County Comprehensive Plan, at 3-23.

⁶⁰ See, Brinnon Subarea Plan at 45.

⁶¹ 18.15.135(6).

1 **Conclusion:** Petitioner has not demonstrated an inconsistency with the Plan's conceptual
2 vision.

3
4 **F. Alleged Inconsistencies with the Comprehensive Plan**

5 Petitioners argue that the Comprehensive Plan map and text amendments should be found
6 non-compliant with the GMA because the designation of a second MPR is internally
7 inconsistent with the statement in the plan that Jefferson County has "one Master Planned
8 Resort, Port Ludlow".⁶² In fact, as Intervenors pointed out,⁶³ the statement in the
9 Comprehensive Plan remains correct. Until such time as the Statesman proposal receives
10 final approval the MPR is still conceptual. In fact, page 3-23 of the Jefferson County
11 Comprehensive Plan states "Jefferson County has one *existing* master planned resort, Port
12 Ludlow."⁶⁴ Several lines later, the Plan notes "The GMA also authorizes counties to allow
13 for the development of *new* MPRs in accordance with RCW 36.70A.360". The italics are in
14 the original, emphasizing that the County was well aware that, while Port Ludlow was the
15 sole current MPR, new MPRs were permissible. The development regulations and
16 development agreement must both be approved before the final MPR development
17 approval may be granted under JCC 18.15.135. Until that time, Port Ludlow remains the
18 only *existing* MPR in Jefferson County.
19
20
21

22 **Conclusion:** Petitioners have not demonstrated that the designation of a second MPR is
23 internally inconsistent with the statement in the plan that Jefferson County has "one Master
24 Planned Resort, Port Ludlow" Until the final MPR development approval is granted under
25 JCC 18.15.135 Port Ludlow remains the only *existing* MPR in Jefferson County.
26

27 **Overall Conclusion:** Petitioners have failed to demonstrate that any of the challenged
28 aspects of the Brinnon MPR create an inconsistency such that one feature of Jefferson
29 County's plan is incompatible with any other feature of its plan or regulation. Likewise none
30
31

32 ⁶² Petitioners' Opening Brief at 22.

⁶³ Intervener's Brief at 34.

⁶⁴ Jefferson County Comprehensive Plan, at 3-23, Exhibit 12-95-59.

1 of the challenged features preclude achievement of any other feature of its Plan or violate
2 RCW 36.70A.070.

3
4 Alleged Lack of Compliance with RCW 36.70A.070(1)

5 Petitioners allege that while the County has defined in the text amendment that the Brinnon
6 MPR will have 890 residential units within its 256 acres, RCW 36.70A.070(1) also requires a
7 description of "building intensities" to define the limits of allowed commercial and industrial
8 development.⁶⁵

9
10 RCW 36.70A.070(1) requires in pertinent part that "The land use element shall include
11 population densities, building intensities, and estimates of future population growth."

12 Intervenor points out that the Comprehensive Plan as a whole contains these features and
13 none of those provisions were at issue in the present appeal. Intervenor also note that the
14 Plan provisions on MPRs have both goals and policies to control development at LNP 24.1-
15 24.13 which the Board of County Commissioners found were met by this proposal.⁶⁶

16 Furthermore, it is clear from the Ordinance under appeal that the County approved a multi-
17 step process in which new zoning code language and a development agreement would be
18 approved subsequently, all as authorized by the Jefferson County Plan and Uniform
19 Development Code. Building intensities will be defined and limited in the master plan and
20 development agreement as specified in the Jefferson County Code. These will need further
21 review and approval. Furthermore, the densities and intensities were analyzed within the
22 DEIS and FEIS. The MPR must develop within the scope of that environmental review. No
23 development permits can be issued until the BOCC finds that the MPR is consistent with the
24 Jefferson County Plan, development code, and conditions imposed by the master plan and
25 development agreement.
26
27
28

29 **Conclusion:** Petitioners have not demonstrated a violation of RCW 36.70A.070(1). Plan
30 provisions on MPRs have both goals and policies to control development. The County
31
32

⁶⁵ Petitioners' Opening Brief at 22.

⁶⁶ Intervenor's Brief at 35.

1 approved a multi-step process in which new zoning code language and a development
2 agreement would be approved subsequently. Building intensities will be defined and limited
3 in that process. Petitioners have not carried their burden of proof in regards lack of
4 compliance with RCW 36.70A.070(1).
5

6 **Issue No. 3:** Whether the adoption of the Ordinance and environmental review complies
7 with the substantive and procedural requirements of chapter 43.21C RCW including
8 implementing regulations in chapter 197-11 WAC and JCC 18.40.700 et seq. including the
9 procedural requirement for an alternative in the EIS other than the no action alternative with
10 less impact than the proposal and substantive requirements including inadequate analysis
11 related to surface and ground water (including potable, stormwater (including adverse
12 impacts to Hood Canal and shorelines) and wastewater) quality, quantity, reliability,
13 saltwater intrusion and other impacts on and degradation of neighboring wells, Hood Canal,
14 and aquifers and impacts of major storms with power failures, rain analysis, disposal of
15 waste, habitat and significant species impacts, adverse impact on protecting surrounding
16 rural character (including from signage, overuse, overdevelopment), emergency services
17 including fire, police, medical and rescue, traffic related (including non-motorized) on roads,
18 trails, Puget Sound water and air (including single emergency exit on Black Point Rd),
19 protection of natural features, use of kettles for water storage and destruction of features of
20 natural hollows and streams, increased use of marina, energy supply, light pollution at night,
21 impacts from overuse of offsite recreational facilities, displacement impacts on long term
22 residents, isolated wetland impacts, sustainability of development, impacts on Brinnon
23 community and schools, and workforce unavailability?
24

25 The standard of review applicable to the review of a jurisdiction's compliance with SEPA
26 was identified by the Board in *Hood Canal v. Jefferson County*, WWGMHB No. 03-2-0006
27 (CO 10/14/04):
28

29 Petitioners also have the burden of showing a lack of SEPA compliance for GMA
30 purposes under the clearly erroneous standard. *Durland v. San Juan County*,
31 WWGMHB Case No. 00-2-0062c (Final Decision and Order, May 7, 2001).
32 Whether an environmental impact statement (EIS) is adequate is a question
of law. *Citizens v. Klickitat County*, 122 Wn.2d 619, 626, 866 P.2d 1256 (1993).
The adequacy of an EIS is tested under the "rule of reason", which requires a
"reasonably thorough discussion of the significant aspects of the probable
environmental consequences" of the agency's decision. *Ibid.* The decision of the
governmental agency must be accorded substantial weight. RCW 43.21C.090.

In the FDO issued in that case, the Board noted:

1 The required contents of an EIS are set out in WAC 197-11-440.^{67[1]} For
2 nonproject actions such as comprehensive plan amendments, the general rules
3 for the content of an EIS apply except that the lead agency (in this case, the
4 County) is granted more flexibility in preparing an EIS than in project actions. This
5 is "because there is normally less detailed information available on their
6 environmental impacts and on any subsequent project proposals". WAC 197-11-
442.

7 A. SEPA Policies

8 Petitioners challenge SEPA compliance on the basis that the Ordinance failed to cite the
9 agency SEPA policy that is relied upon as the basis for each condition of approval
10 contained in Finding 63.⁶⁸

11
12 In finding 63 of Ordinance 01-0128-08, the County imposed conditions of approval on
13 this Comprehensive Plan amendment "pursuant to the authority that is granted the County
14 legislative authority under SEPA by RCW 43.21C.060, WAC 197-11-660 and Jefferson
15 County Code 18.40.770."⁶⁹

16
17
18 WAC 197-11-660, Substantive authority and mitigation, provides:

19 (1) Any governmental action on public or private proposals that are not exempt may
20 be conditioned or denied under SEPA to mitigate the environmental impact subject to
21 the following limitations:

22 (a) Mitigation measures or denials shall be based on policies, plans, rules, or
23 regulations formally designated by the agency (or appropriate legislative body, in the
24 case of local government) as a basis for the exercise of substantive authority and in
25 effect when the DNS or DEIS is issued.

26 (b) Mitigation measures shall be related to specific, adverse environmental impacts
27 clearly identified in an environmental document on the proposal and shall be stated in
28 writing by the decision maker. The decision maker shall cite the agency SEPA policy
29 that is the basis of any condition or denial under this chapter (for proposals of
30 applicants). After its decision, each agency shall make available to the public a
31 document that states the decision. The document shall state the mitigation measures,
32

⁶⁸ Petitioners' Opening Brief at 23.

⁶⁹ Exhibit 14-4, at 10.

1 if any, that will be implemented as part of the decision, including any monitoring of
2 environmental impacts. Such a document may be the license itself, or may be
3 combined with other agency documents, or may reference relevant portions of
4 environmental documents.

5 JCC 18.40.770 provides the County's substantive SEPA authority pursuant to WAC 197-11-
6 660:

7 (3)The county designates and adopts by reference the following county plans,
8 ordinances and policies as the basis for exercise of county authority pursuant to this
9 article:

10 (a) The county adopts by reference the policies in the following Jefferson County
11 plans and ordinances:

- 12 (i) The Jefferson County Comprehensive Plan, as now exists or may
13 hereafter be amended;
- 14 (ii) The Jefferson County Shoreline Master Program, as now exists or may
15 hereafter be amended;
- 16 (iii) This Unified Development Code, as now exists or may hereafter be
17 amended;
- 18 (iv) The Jefferson County building code, Chapter 15.05 JCC, as now exists
19 or may hereafter be amended;
- 20 (v) The Jefferson County flood damage protection ordinance, Chapter
21 15.15 JCC, as now exists or may hereafter be amended;
- 22 (vi) The Jefferson County stormwater management ordinance, JCC
23 18.30.070, as now exists or may hereafter be amended;
- 24 (vii) The Jefferson County Road, Traffic and Circulation Standards, as they
25 now exist or may hereafter be amended;
- 26 (viii) The Secretary of the Interior's Standards for Rehabilitating Historic
27 Buildings; and
- 28 (ix) All other county plans, ordinances, regulations and guidelines adopted
29 after the effective date of this Unified Development Code.

30 Thus, consistent with WAC 197-11-660, the County cited the agency SEPA policies that
31 formed the basis of the conditions imposed. Petitioner has failed to demonstrate that the
32 County was legally obligated to cite the supporting SEPA policy after each and every
condition of approval. We do not read WAC 197-11-660 to impose such a requirement.

B. Alternatives

1 Petitioner argues that "Because the EIS did not contain an alternative with "a lower
2 environmental cost or decreased level of environmental degradation" it should be found to
3 be in violation of WAC 197-11-440(5)(b).⁷⁰

4
5 WAC 197-11-440(5)(b) requires that among the range of alternatives considered in the EIS
6 the following shall be included:

7 (b) Reasonable alternatives shall include actions that could feasibly attain or
8 approximate a proposal's objectives, but at a lower environmental cost or decreased
9 level of environmental degradation.

10 While the County⁷¹ and Intervenor⁷² respond that the County complied by studying the "no
11 action alternative", Petitioners respond by noting that there must be a reasonable alternative
12 that could feasibly attain the project objectives, but at a lower environmental cost, and the
13 "no action alternative", while having less of an impact, does not meet the proposal's
14 objectives.⁷³

15
16
17 The FEIS considered three alternatives to the proposal. The "no action alternative" assumed
18 the Master Plan proposal is withdrawn or denied, and the area develops under current
19 zoning.⁷⁴ The Brinnon Subarea Plan alternative assumes that the entire area is included
20 within the Master Plan, and as such is subject to the Master Planned Resort limitations on
21 resort-based urban development.⁷⁵ This alternative includes the entirety of the area
22 identified in the Brinnon Subarea Plan as potentially suitable for a Master Planned Resort,
23 an area of 310 acres. The Hybrid alternative assumes that the lands outside the Statesman
24 proposal develop under the County's RR1-5 guidelines.⁷⁶ These guidelines would allow one
25 unit for five acres base density for residential units, and limited business uses. In the DEIS,
26 the summary of impacts and mitigation requirements under the Hybrid alternative assumes
27
28

29
30 ⁷⁰ Petitioners' Opening Brief at 24.

⁷¹ Jefferson County's Brief at 27

⁷² Intervenor's Brief at 44.

⁷³ Petitioners' Reply Brief at 24.

⁷⁴ Exhibit 20-571, FEIS at 4-1, et seq.

⁷⁵ Id, at 4-12 et seq.

⁷⁶ Id. at 4-20 to 4-22.

1 that: a) the uses west of Highway 101 must be limited to uses consistent with small-scale
2 resort and tourist service uses; b) the uses west of Highway 101 must be limited to onsite
3 well and wastewater disposal and may not hook to urban facilities from the Master Planned
4 Resort; and, c) all development west of Highway 101 shall be subject to development
5 conditions identified in an approved stormwater management plan, wastewater disposal
6 plan, and Public Works Department standards for roads.
7

8 While the Board agrees with Petitioners that the "no action alternative" does not meet the
9 requirement of WAC 197-11-440(5)(b) because it does not "feasibly attain or approximate a
10 proposal's objectives" this is not to say that the other alternatives considered likewise failed
11 to meet this standard. Petitioners' rather brief (four line) argument on this point provided no
12 factual argument to demonstrate that the County failed to consider an alternative that
13 achieved the proposal's objectives at a lower environmental cost except to point to the
14 statement in the Summary of the DEIS that the alternatives have "similar impacts since the
15 bulk of the property is put to resort uses"⁷⁷. However, this is far short of a comparison of the
16 nature of the impacts of the different alternatives. Petitioner presented no evidence from
17 which it could clearly be determined that any of the alternatives considered would not have
18 a lower environmental cost or decreased level of environmental degradation.
19 Consequently Petitioners did not carry their burden to demonstrate that none of the
20 alternatives met the standard of WAC 197-11-440(5)(b).
21
22
23

24 C. Stormwater

25 Petitioner alleges that the SEPA analysis is inadequate with respect to stormwater
26 management to be able to determine if it might be possible to reach zero discharge from the
27 golf course site.⁷⁸ Further, they allege that the FEIS fails to analyze water quality impacts of
28 the anticipated traffic associated with the development.⁷⁹
29
30
31

32 ⁷⁷ Exhibit 20-432 at xvi.

⁷⁸ Petitioners' Opening Brief at 24.

⁷⁹ Id. at 25.

1 With regard to non-project proposals, WAC 197-11-442 provides:

2 (1) The lead agency shall have more flexibility in preparing EISs on nonproject
3 proposals, because **there is normally less detailed information available on**
4 **their environmental impacts and on any subsequent project proposals.** The
5 EIS may be combined with other planning documents.

6 (2) The lead agency shall discuss impacts and alternatives **in the level of detail**
7 **appropriate to the scope of the nonproject proposal** and to the level of
8 planning for the proposal. Alternatives should be emphasized. In particular,
9 agencies are encouraged to describe the proposal in terms of alternative means
10 of accomplishing a stated objective (see WAC 197-11-060(3)). Alternatives
11 including the proposed action should be analyzed at a roughly comparable level of
12 detail, sufficient to evaluate their comparative merits (this does not require
13 devoting the same number of pages in an EIS to each alternative).

14 (3) If the nonproject proposal concerns a specific geographic area, **site specific**
15 **analyses are not required, but may be included for areas of specific**
16 **concern.** The EIS should identify subsequent actions that would be undertaken
17 by other agencies as a result of the nonproject proposal, such as transportation
18 and utility systems.

19 (4) The EIS's discussion of alternatives for a comprehensive plan, community
20 plan, or other areawide zoning or for shoreline or land use plans shall be limited to
21 **a general discussion of the impacts of alternate proposals for policies**
22 **contained in such plans,** for land use or shoreline designations, and for
23 implementation measures. The lead agency is not required under SEPA to
24 examine all conceivable policies, designations, or implementation measures but
25 should cover a range of such topics. The EIS content may be limited to a
26 discussion of alternatives which have been formally proposed or which are, while
27 not formally proposed, reasonably related to the proposed action.
28 (emphasis added).

29 As noted above, the action taken by the County in adopting Ordinance 01-0128-08 was but
30 the first step of a multi-step process for the development of the Brinnon MPR. Furthermore,
31 the County specifically conditioned the proposal to ensure that the environmental impacts
32 on water quality/quantity and discharges from the golf course would be reviewed. Condition
63 (o) required that "Detailed review is needed at that project-level SEPA analysis to ensure

1 that water quantity and water quality issues are addressed.”⁸⁰ Condition 63 (q) required that
2 “Stormwater discharge from the golf course shall meet requirements of zero discharge into
3 Hood Canal.”⁸¹

4
5 In *Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wn.2d 201,
6 210, 634 P.2d 853 (1981), the Supreme Court recognized the benefit of phased
7 environmental review, noting that, at the early stages “it is extremely difficult to assess [a
8 project’s] full impact. Given the magnitude of the project, the length of time over which it will
9 evolve and the multiplicity of variables, staged EIS review appears to be an unavoidable
10 necessity.” This is also true in the case of the Brinnon MPR. The environmental impacts
11 of this project were studied at an appropriate level of detail, with provision for further
12 environmental review at the project level stages of development. Petitioner has not
13 demonstrated that this approach is clearly erroneous.
14

15
16 **Conclusion:** Petitioners have not demonstrated that the County failed to consider an
17 alternative which would “attain or approximate a proposal’s objectives, but at a lower
18 environmental cost or decreased level of environmental degradation”. The environmental
19 impacts of this project were studied at an appropriate level of detail, with provision for further
20 environmental review at the project level stages of development. Petitioner has not
21 demonstrated that this approach is clearly erroneous.
22

23
24 **Issue No. 4:** Whether any provision found in noncompliance in the other issues should also
25 be found invalid for substantial interference with Goals 1, 2, 5, 9, 10, 11, 12, and 14?

26
27 Petitioners’ argument for the imposition of invalidity rests on their claim of lack of public
28 participation.⁸² Petitioners assert that the County is currently working with Pleasant Harbor
29 on the adoption of a Development Agreement that will vest the projects if the
30 Comprehensive Plan amendment remains valid, and that such vesting should not be
31

32 ⁸⁰ Exhibit 14-4 at 12.

⁸¹ Id. at 13.

⁸² Petitioners’ Opening Brief at 14.

1 allowed to occur without the prior benefit of public participation. This they argue
2 substantially interferes with the fulfillment of Goal 11 of the GMA.⁸³

3
4 In response Intervenor argues that Petitioners have not demonstrated that the County's
5 actions materially interfere with its ability to comply with the GMA. Intervenor points out that
6 MPRs are authorized by the GMA, the County Comprehensive Plan and development
7 regulations have detailed sections on how to process a MPR to assure compliance with the
8 GMA, and that the Statesman proposal is within an area identified in the Brinnon Subarea
9 Plan as appropriate for an MPR.⁸⁴ Intervenor notes that nothing in the present process vests
10 any specific development activity, and that there are still public hearings and approvals
11 necessary before any application can vest.⁸⁵

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

18
19 In this case, the Board has not found any of the challenged portions of the Brinnon MPR to
20 be noncompliant with the GMA and thus there is no basis for a finding of invalidity.

21
22 **Conclusion:** The Board has found the challenged portions of the Brinnon MPR
23 Comprehensive Plan amendment to be compliant with the GMA. There is no basis for a
24 finding of invalidity.

25 26 VI. FINDINGS OF FACT

- 27
28 1. Jefferson County is a county located west of the crest of the Cascade Mountains that
29 is required to plan pursuant to RCW 36.76A.040.

30
31
32 ⁸³ Id.

⁸⁴ Intervenor's Brief at 48.

⁸⁵ Id. at 49.

- 1 2. On January 28, 2008 the County adopted Ordinance No. 01-0128-08, amending the
2 Jefferson County Comprehensive Plan to reflect that certain parcels of property in
3 Brinnon, Washington shall be given an underlying land use designation of Master
4 Planned Resort.
- 5 3. On November 27, 2007 the County's SEPA Responsible Official published the Final
6 EIS for the Brinnon Master Planned Resort.
- 7 4. On March 19, 2008 Petitioners filed a timely appeal.
- 8 5. Petitioners have standing through participation in writing or orally in the adoption of
9 Ordinance No.01-0128-08.
- 10 6. On April 22, 2008 the Board granted intervenor status to Pleasant Harbor.
- 11 7. Section 2 of Ordinance 01-0128-08 describes the number of acres and units of the
12 Brinnon MPR.
- 13 8. The Planning Commission found that "This proposed MPR rezone of 256 acres on
14 Black Point in Brinnon would create 890 units of permanent and transient housing,"
15 language similar in substance to the text of Section 2.
- 16 9. Ordinance 01-0128-08 adopted 30 conditions of approval as part of Finding 63 to
17 Ordinance 01-0128-08 without an additional hearing on these conditions.
- 18 10. Findings 36 and 37 of the Ordinance found that "only a Comprehensive Plan
19 amendment was under consideration, and that the development agreement and
20 zoning code guiding MPR projects will come before it in a subsequent process after
21 the adoption of this CP amendment. A subsequent development agreement and
22 zoning code shall be consistent with this CP amendment."
- 23 11. The Jefferson County Plan (LNP 24.2) and the JCC 18.15.126(3) allow for a phased
24 process for the approval of a MPR.
- 25 12. The conditions of approval contained in Finding 63 reflect the County's response to
26 the specific concerns raised during the public process.
- 27 13. The Comprehensive Plan Amendment of Ordinance 01-0128-08 was the first step of
28 a five step process that would lead to the development of the Brinnon MPR.
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- 1 14. In the first step, the Planning Commission recommended adoption of the
2 Comprehensive Plan map amendment to apply the Master Planned Resort
3 designation to the lands in question. The Planning Commission recommended seven
4 conditions of approval.
5 15. Jefferson County included the provisions Planning Enabling Act, Chapter 36.70
6 RCW, in its process for approving site specific comprehensive plan amendments.
7
8 16. The Brinnon MPR map amendment is a site specific comprehensive plan
9 amendment.
10 17. Under JCC 18.45.080(2) the BOCC is obligated to conduct additional public hearings
11 only when it "deems a change in the recommendation of the Planning Commission to
12 be necessary".
13 18. Under RCW 36.70.430, incorporated into the Jefferson County code, the BOCC
14 needs to refer changes in a Planning Commission recommendation for further review
15 and hold a hearing.
16
17 19. The Board of County Commissioners did not alter the Planning Commission's
18 recommendation except to add additional conditions.
19 20. Although the legal description of the Ordinance 01-0128-08 includes 14 parcels, the
20 project as noticed by the Planning Commission in its Notice of Hearing describes the
21 project as 13 parcels.
22 21. The DEIS for the Brinnon MPR was issued on September 5, 2007 and the FEIS was
23 issued on November 27, 2007.
24
25 22. The DEIS at page 1-13 defines the Maritime Village Subarea as including the "DNR
26 Lease" land within the subarea in Figure 1-13. (Similar material is on page 1-13 of the
27 FEIS).
28 23. On page 1-17 this area is described as "Marina side – 37+/- acres upland and 15+/-
29 acres tidelands. " Both the DEIS and FEIS contain a Figure 1-4 on page 1-3 with a
30 map showing the DNR Lease land within the Brinnon Subarea – Conceptual Master
31 Plan Area Ownership and describe the acreage as 310.6 (325.8 including DNR
32 Lease). At the bottom of the page it states, "The proposed Master Planned Resort is

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located on the "Statesman" property (approximately 256 acres) upland and 15.2 acres of DNR marina lease area."

- 24. The County held three public workshops in Brinnon on September 11, 18 and 25, 2007, and a public hearing before the Planning Commission on October 3, 2007, to allow the public to address concerns based on the application and the DEIS.
- 25. The proposal for the MPR boundary dated back to at least 2002 and the Brinnon Subarea Plan.
- 26. The boundary for the reduced MPR proposal had been available for public comment since the publication of the Draft EIS in September 2007.
- 27. The public comment period for comments to the BOCC was extended to December 7, 2007 because of a snowstorm.
- 28. Petitioners were able to comment on the process as late as January 14, 2008.
- 29. The Planning Commission recommendation was completed on November 20, 2007 and forwarded to the BOCC in a memorandum dated November 28, 2007.
- 30. The County gave notice for the December 3, 2007, BOCC hearing on November 21, 2007 and provided contact information on how to receive information about the Planning Commission recommendation.
- 31. While the signed map was not delivered until early January 2008, it was consistent with the Planning Commission's earlier recommendation.
- 32. JCC 18.45.080(1)(b) and (c) contain no requirement for written findings. Instead, the Planning Commission addressed the findings required by JCC 18.45.080(1)(b) and (c) in oral findings, as reflected in its minutes.
- 33. As to JCC 18.45.080(1)(b)(i), (ii) and (iii), changed circumstances, assumptions, and values of Jefferson County residents, the record reflects that there was no consensus on "changed circumstances"; that the Planning Commission found that "assumptions of the Comprehensive Plan are not all valid"; and that as to County wide attitudes, values within the Comprehensive Plan, the Planning Commission was "in support".
- 34. As to JCC 18.45.080(1)(c)(i), the Planning Commission did not propose findings with regard to site specific concurrency.

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- 1 35. When it resumed deliberations on the proposal on November 14, 2007, the record
2 reflects that it addressed the findings required by JCC 18.45.080(1)(c)(ii) – (viii).
3 36. The Planning Commission voted on and accepted all findings except (vii), adequacy
4 or availability of urban facilities, which it found to be non-applicable at this stage of
5 the MPR approval process.
6 37. While the Planning Commission did not reach consensus on specific findings
7 regarding changed circumstances, JCC 18.45.080(1)(b) does not require a finding of
8 changed circumstances, but only that they “consider” such. The record reflects
9 consideration did occur.
10 38. The Planning Commission accepted by consensus that “The proposed amendment
11 is consistent with the Growth Management Act, Chapter 36.70A., RCW, the County-
12 wide Planning Policy for Jefferson County, and any other applicable inter-
13 jurisdictional policies or agreement, and any other local, state or federal laws.”
14 39. The Jefferson County Planning Commission did not sign a map showing approval of
15 the Brinnon MPR boundary until January 14, 2008.
16 40. The Brinnon subarea plan map shows a conceptual area within which a master-
17 planned resort may be located. The Statesman proposal is located within that area
18 but does not include certain properties such as the second marina, and the Tudor
19 and Jupiter properties.
20 41. The County confirmed at oral argument that portions of the conceptual area remain
21 outside the Statesman proposal.
22 42. Map BR- 3 in the subarea plan still shows a Rural Residential (RR) designation while
23 the Brinnon MPR designation has been amended on the comprehensive plan map.
24 As illustrated in Exhibit 16 -- 83, the County employs a phased process wherein
25 zoning changes will be approved subsequent to the approval of comprehensive plan
26 amendments. Modification of map BR -- 3 will be made during the second phase.
27 43. Policy P3.0 describes the Brinnon Flats as continuing to develop as the main
28 commercial and community center of the Brinnon area
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- 1 44. The FEIS for the Brinnon MPR describes the commercial facilities as including a
2 restaurant, conference center, and spa all intended to serve the resort.
- 3 45. LNP 24.3 and RCW 36.70A.360(4)(b) prohibit "new urban or suburban land uses in
4 the vicinity of the MPR".
- 5 46. There is no evidence that rural scale development that is permitted under the
6 County's rural area zoning would be inconsistent with either LNP 24.3 or RCW
7 36.70A.360(4)(b).
- 8 47. The County is in the midst of a "14 step process for decision-making" wherein "the
9 development agreement and zoning code guiding MPR projects will come before it in
10 subsequent process after the adoption of this CP amendment." A determination that
11 the application will be consistent with the Unified Development Code is appropriate at
12 a later stage.
- 13 48. The Brinnon MPR is located in the vicinity of Hood Canal, the Olympic National
14 Forest, and the Olympic Mountains. The Jefferson County Comprehensive Plan and
15 the Brinnon Subarea Plan identify this as an area of natural amenities.
- 16 49. Jefferson County has one Master Planned Resort, Port Ludlow.
- 17 50. Until such time as the Statesman proposal receives final approval the MPR is still
18 conceptual.
- 19 51. In finding 63 of Ordinance 01-0128-08 the County imposed conditions of approval for
20 this Comprehensive Plan amendment "pursuant to the authority that is granted the
21 County legislative authority under SEPA by RCW 43.21C.060, WAC 197-11-660 and
22 Jefferson County Code 18.40.770.
- 23 52. In addition to the "no action alternative" the EIS considered the MPR as proposed,
24 the full resort alternative which assumed lands on both sides of US 101 were to
25 develop at urban resort densities, and the hybrid alternative, which assumed that the
26 MPR is developed and as a consequence the lands across US 101 would build out
27 under rural resort and commercial guidelines.
- 28 53. The County specifically conditioned the proposal to ensure that the environmental
29 impacts on water quality/quantity and discharges from the golf course would be
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1 reviewed. Condition 63 (o) required that "Detailed review is needed at that project-
2 level SEPA analysis to ensure that water quantity and water quality issues are
3 addressed."

4 54. Condition 63 (q) required that "Stormwater discharge from the golf course shall meet
5 requirements of zero discharge into Hood Canal.
6

7 55. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.
8

9 VII. CONCLUSIONS OF LAW

- 10 A. The Board has jurisdiction over the parties to this action.
11 B. The Board has jurisdiction over the subject matter of this action.
12 C. Petitioners have standing to raise the issues in this case.
13 D. Petitioners have failed to demonstrate Section 2 of Ordinance 01-0128-08 was
14 adopted in violation of the GMA's public participation requirements. (RCW
15 36.70A.140, RCW 36.70A.035, RCW 36.70A.070).
16 E. Where the BOCC accepted the Planning Commission's recommendation regarding
17 the Comprehensive Plan amendment, and went further in adding conditions of
18 approval to apply in later phases of approval, no further public hearing was
19 necessary. No violations of JCC 18.45.010(2) or the Jefferson County plan
20 requirements for processing site specific comprehensive plan amendments occurred.
21 F. Petitioners have failed to demonstrate there was inadequate notice to the public as to
22 how many parcels were intended to be included in the map amendment that violated
23 RCW 36.70A.035.
24 G. Petitioners have not carried their burden of proof that they were deprived of "effective
25 notice" of the Planning Commission's recommendations.
26 H. The Planning Commission made all applicable findings and substantially complied
27 with JCC 18.45.080(1)(b) and (c).
28 I. The BOCC accepted the recommendation of the Planning Commission by adopting
29 the map as Exhibit B of Ordinance 01-0128-08.
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- 1 J. Petitioners have not demonstrated a violation of the public participation requirements
2 of the Growth Management Act.
- 3 K. Petitioners have not demonstrated an inconsistency in the Brinnon Subarea Plan
4 associated with describing the Brinnon MPR as "conceptual".
- 5 L. Petitioners have not demonstrated an inconsistency in the Brinnon Subarea Plan
6 associated with map BR- 3.
- 7
8 M. Petitioners have not demonstrated an inconsistency in the Brinnon Subarea Plan
9 associated with Policy P3.0.
- 10 N. Petitioners have not demonstrated an inconsistency in the Brinnon Subarea Plan
11 associated with Policy *LNP 24.3*.
- 12 O. Petitioners have failed to carry their burden to demonstrate an internal inconsistency
13 because the County has not committed to the scale and intensity of uses proposed
14 by the project.
- 15 P. Nothing in RCW 36.70A.360(1) suggests that the "setting of significant natural
16 amenities" cannot be located in the surrounding area.
- 17 Q. Petitioners have not demonstrated an inconsistency with the Plan's conceptual
18 vision.
- 19 R. Petitioners have not demonstrated a violation of RCW 36.70A.070(1). Jefferson
20 County has adopted Plan provisions on MPRs that have both goals and policies, as
21 well as development regulations to control development of the MPR. The County
22 approved a multi-step process in which new zoning code language and a
23 development agreement would be approved subsequently. Building intensities will
24 be defined and limited in that process.
- 25 S. Petitioners have not demonstrated that the County failed to consider an alternative
26 which would "attain or approximate a proposal's objectives, but at a lower
27 environmental cost or decreased level of environmental degradation" as provided for
28 by WAC 197-11-440(5)(b).
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32 T. The environmental impacts of this project were studied at an appropriate level of
detail, with provision for further environmental review at the project level stages of

1 development. Petitioner has not demonstrated that this approach is clearly
2 erroneous.

3 U. The Board has found the challenged portions of the Brinnon MPR comprehensive
4 plan amendment to be compliant with the GMA, and thus there is no basis for a
5 determination of invalidity.

6 V. Portions of the Issue statements not addressed in this Order were not briefed or
7 argued by Petitioners and are deemed abandoned.

8 W. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.
9

10
11 **VIII. ORDER**

12 Based on the foregoing the Board finds the County's adoption of Ordinance No. 01-0128-08
13 to be in compliance with the GMA.

14
15 DATED this 15th day of September 2008.

16
17 
18 James McNamara, Board Member

19
20 
21 William Roehl, Board Member

22
23 
24 Holly Gadbow, Board Member

25
26 Pursuant to RCW 36.70A.300 this is a final order of the Board.
27

28 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
29 mailing of this Order to file a petition for reconsideration. Petitions for
30 reconsideration shall follow the format set out in WAC 242-02-832. The original and
31 three copies of the petition for reconsideration, together with any argument in
32 support thereof, should be filed by mailing, faxing or delivering the document directly
to the Board, with a copy to all other parties of record and their representatives.
Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for

1 filing a petition for judicial review.

2 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
3 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
4 judicial review may be instituted by filing a petition in superior court according to the
5 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
6 Enforcement. The petition for judicial review of this Order shall be filed with the
7 appropriate court and served on the Board, the Office of the Attorney General, and all
8 parties within thirty days after service of the final order, as provided in RCW
9 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
10 but service on the Board means actual receipt of the document at the Board office
11 within thirty days after service of the final order.

12 **Service.** This Order was served on you the day it was deposited in the United States
13 mail. RCW 34.05.010(19).
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1 **WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD**

2 Case No. 08-2-0014

3 Brinnon Group and Brinnon MPR Opposition v. Jefferson County, et al.

4 **DECLARATION OF SERVICE**

5 I, PAULETTE YORKE, under penalty of perjury under the laws of the State of
6 Washington, declare as follows:

7 I am the Executive Assistant for the Western Washington Growth Management
8 Hearings Board. On the date indicated below a copy of a FINAL DECISION AND ORDER
9 in the above-entitled case was sent to the following through the United States postal mail
10 service:

11 Brinnon Group
12 c/o Jean Johnson
13 PO Box 639
14 Brinnon, WA 98320

Brinnon MPR Opposition
c/o Rebecca Couture
PO Box 639
Brinnon, WA 98320

15 Gerald Steel, PE
16 Attorney-at-Law
17 7303 Young Rd NW
18 Olympia, WA 98502

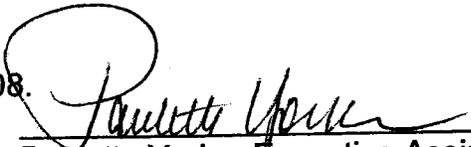
Jefferson County Auditor
PO Box 563
Port Townsend, WA 98368

19 David Alvarez
20 Jefferson County Prosecuting Attorney
21 PO Box 1220
22 Port Townsend, WA 98368

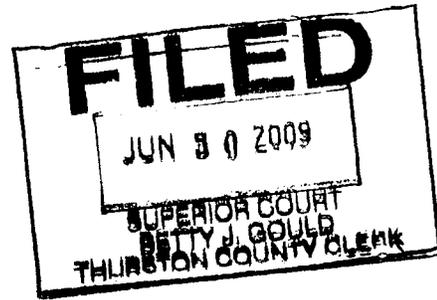
Pleasant Harbor
c/o Elin M. McLeod
2700 NW Pine Cone Drive
PO Box 1754
Issaquah, WA 98027

Alexander Mackie
Perkins Coie LLP
1201 Third Avenue Suite 4800
Seattle, WA 98101

23 DATED this 15th day of September, 2008.

24 
Paulette Yorke, Executive Assistant

- EXPEDITE
- Hearing is set:
- No hearing is set.



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THE HONORABLE RICHARD HICKS

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

BRINNON GROUP, a Washington
nonprofit corporation; and BRINNON
MPR OPPOSITION, a Washington
nonprofit corporation,

Petitioners,

v.

WESTERN WASHINGTON
GROWTH MANAGEMENT
HEARINGS BOARD, an
administrative agency; JEFFERSON
COUNTY, a political subdivision of
the State of Washington; PLEASANT
HARBOR MARINA AND GOLF
RESORT, LLP; and PLEASANT
HARBOR MARINA, LLC,

Respondents.

No. 08-2-02605-9

[Proposed] ORDER

APA RCW 34.05.510 et sec.

SEPA RCW 43.21C.075

This matter came before the Court on the petition of Brinnon Group and
Brinnon MPR Opposition (“Petitioners”) to review the decisions of the
Western Washington Growth Management Hearings Board dated September

ORDER ON REVIEW – 1

57577-0007/LEGAL16332741.1
57577-0007/LEGAL16428062.1

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15, 2008 and October 14, 2008, *Brinnon Group et al. v. Jefferson County and Pleasant Harbor*, WWGMHB No. 08-2-0014, and also on the direct judicial SEPA appeal under the authority of RCW 43.21C.075.

Appearing for Petitioners, Mr. Gerald Steel; appearing for Respondent Jefferson County, Mr. David Alvarez, Jefferson County Chief Civil Deputy Prosecuting Attorney; appearing for Respondents Pleasant Harbor Marina and Golf Resort, LLP and Pleasant Harbor Marina, LLC, Mr. Alexander Mackie, Perkins Coie LLP (“Pleasant Harbor”). Ms. Martha Lantz, Assistant Attorney General, filed a notice of appearance for the Growth Board, but did not participate in the appeal.

The APA appeal is brought pursuant to RCW 34.05.510 *et seq.* and is addressed to the appellate powers of the Court. The Growth Board decisions and record were duly transmitted to the Court and the Court considered the briefs and arguments of counsel.

The applicable standards for review are set forth in the statute as follows:

(3) Review of agency orders in adjudicative proceedings.
The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

...

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

RCW 34.05.570(3).

ORDER ON REVIEW – 2

57577-0007/LEGAL16332741.1
57577-0007/LEGAL16428062.1

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Jefferson County approved an amendment to the Jefferson County Comprehensive Plan to authorize a proposal by Pleasant Harbor to develop a Master Planned Resort at Black Point in Brinnon, in an area approved for master planned resorts in the Brinnon subarea plan. The amendment consisted of a map with a single color identified as MPR and a text identifying the MPR and the limit of 890 units. The Comprehensive Plan amendment was the first step in a multi-step process, which anticipated subsequent environmental review and approvals for zoning text and map and a development agreement, but no further comprehensive plan amendments, before any development could occur.

The Comprehensive Plan amendment was approved January 28, 2008 by Ordinance 01-0128-08 and supported by a Final EIS issued November 27, 2007. The Brinnon Group timely appealed the decisions to the Western Washington Growth Management Hearings Board and after a hearing on the record before the County the Growth Board issued a 44-page opinion with findings and conclusions, holding the actions of the County were in compliance with the State's Growth Management Act. Reconsideration was denied in an order issued on October 14, 2008. This appeal followed.

Petitioners raised four primary issues with the Growth Board's decisions for this Court to review:

1. That the Growth Board erred when it concluded that the County complied with its public participation program, including provisions of the Planning Enabling Act, Chapter 36.70 RCW;

ORDER ON REVIEW – 3

57577-0007/LEGAL16332741.1
57577-0007/LEGAL16428062.1

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2. That the Growth Board erred when it concluded that the adopted amendment was internally consistent with the Brinnon Subarea Plan within the meaning of RCW 36.70A.070 (preamble);

3. That the Growth Board erred when it concluded that the amendment included land use policies restricting building intensities in compliance with RCW 36.70A.070(1); and

4. That the Growth Board erred when it found the County complied with the State Environmental Policy Act (SEPA), Chapter 43.21C RCW.

Petitioners also filed a direct judicial SEPA appeal under the authority of RCW 43.21C.075 which challenged that the County failed to comply with SEPA.

As a preliminary matter, while Petitioners made reference to challenging all findings and conclusions inconsistent with Petitioners' arguments, no finding was specifically identified in the Petition as one not supported by the record, nor did counsel call any such finding to the Court's attention at argument. For that reason, the findings of the Growth Board below are considered verities before this Court.

Public Participation

The first claim of error raised by Petitioners is that the Growth Board erred in not invalidating the ordinance for failure to comply with the public participation requirements of the Growth Management Act ("GMA"), RCW 36.70A.070(preamble) and .140. Petitioners argued, in part, that the County failed to comply with portions of the Planning Enabling Act, RCW 36.70.430 because the County adopted the Planning Enabling Act as part of its GMA public participation program. The error is claimed because the Board of

1 County Commissioners altered the recommendation of the Planning
2 Commission without referring the changes back to the Planning Commission
3 for an additional hearing.

4 Specifically, Petitioners allege that the Board of County Commissioners
5 approved a map different in form from the map recommended by the Planning
6 Commission, added conditions in addition to those recommended by the
7 Planning Commission, and adopted a text not recommended by the Planning
8 Commission. Petitioners allege this violates the statutory requirements of RCW
9 36.70.430, which provides:
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18 When it deems it to be for the public interest, or when it
19 considers a change in the recommendations of the planning
20 agency to be necessary, the board may initiate
21 consideration of a comprehensive plan, or any element or
22 part thereof, or any change in or addition to such plan or
23 recommendation. The board shall first refer the proposed
24 plan, change or addition to the planning agency for a report
25 and recommendation. Before making a report and
26 recommendation, the commission shall hold at least one
27 public hearing on the proposed plan, change or addition.
28 Notice of the time and place and purpose of the hearing
29 shall be given by one publication in a newspaper of general
30 circulation in the county and in the official gazette, if any,
31 of the county, at least ten days before the hearing.
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38 RCW 36.70.430.

39 Petitioners argue that the failure to refer the changes back to the
40 Planning Commission violated the public participation requirements of the
41 GMA, particularly since Jefferson County had specifically incorporated RCW
42 36.70.430 into the County public participation program.
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ORDER ON REVIEW – 5

57577-0007/LEGAL16332741.1
57577-0007/LEGAL16428062.1

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1 The Growth Board found that the County implemented an extensive
2 public participation program allowing the public and Petitioners ample
3 opportunity to comment on the proposal, which was detailed in the FEIS and in
4 fact commented in detail. Growth Board September 15, 2008 Decision,
5 Findings 24, 26-28, and 30. This Court agrees those findings are amply
6 supported in the record and Petitioners have not demonstrated that these
7 findings are erroneous.
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12 The record shows that the Board of County Commissioners modified the
13 map recommended by the Planning Commission by adding the DNR leased
14 area (shown as part of the proposal in the FEIS), removing the land use
15 designations, and adding conditions of approval and by adding a text
16 amendment similar to that in the application, but not specifically recommended
17 by the Planning Commission.
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21 The record also shows that the Comprehensive Plan amendment
22 approving the master plan resort proposal was within the area approved for
23 master planned resorts in the Brinnon subarea plan, that the actions of the
24 County in approving the mapped area was the first of a five-step process and
25 that the next step was for the County to identify a zoning ordinance (map and
26 text) and development agreement that would assure that the size and scale of
27 the master planned resort identified in the FEIS and approved in the ordinance
28 would in fact be achieved before applicant could apply for any permits.
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31 While the record shows that the modifications made by the Board of
32 County Commissioners were not referred back to the Planning Commission,
33 that failure alone is not sufficient to warrant reversal of the Growth Board
34 decision. The Legislature provided in the Growth Management Act that "strict
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ORDER ON REVIEW – 6

57577-0007/LEGAL16332741.1
57577-0007/LEGAL16428062.1

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1 compliance” with the public participation program is not required where public
2 participation has in fact been achieved.

3
4 Errors in exact compliance with the established program
5 and procedures shall not render the comprehensive land use
6 plan or development regulations invalid if the spirit of the
7 program and procedures is observed.
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11 RCW 36.70A.140.

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13 Further, in adopting the GMA provision some 30 years after the
14 Planning Enabling Act (Chapter 36.70 RCW) was adopted, the Legislature
15 specifically addressed circumstances when a County Commission may make
16 changes to a Planning Commission recommendation without referring the
17 matter back for additional public review.
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24 (2)(a) *Except as otherwise provided in (b)* of this subsection,
25 if the legislative body for a county or city chooses to
26 consider a change to an amendment to a comprehensive plan
27 or development regulation, and the change is proposed after
28 the opportunity for review and comment has passed under
29 the county’s or city’s procedures, an opportunity for review
30 and comment on the proposed change shall be provided
31 before the local legislative body votes on the proposed
32 change.
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37 (b) An additional opportunity for public review and
38 comment is not required under (a) of this subsection if:
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41 (i) An environmental impact statement has been prepared
42 under chapter 43.21C RCW for the pending resolution or
43 ordinance and the proposed change is within the range of
44 alternatives considered in the environmental impact
45 statement;
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ORDER ON REVIEW – 7

57577-0007/LEGAL16332741.1
57577-0007/LEGAL16428062.1

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(ii) The proposed change is within the scope of the alternatives available for public comment;

RCW 36.70A.035 (emphasis supplied).

A referral to the Planning Commission under RCW 36.70.430 specifically requires an additional public hearing.¹

The record shows the map adopted by the Commissioners as the area appropriate for a master planned resort of the size and scale proposed by Pleasant Harbor was substantially the same as the map area shown in the FEIS and clearly within the scope of alternative available for public review.

Similarly the additional conditions added by the Board of County Commissioners were in response to the extensive public comment received in response to the FEIS and proposal, and the text amendment merely described in general terms the purpose of the map change that was subject to the FEIS and extensive public comment.

As a consequence, the Court cannot find the decision of the Growth Board upholding the County process to be clearly erroneous or the erroneous application of the law to the facts of this case and Petitioners' claim is denied for failure to meet their burden of proof.

Other Claims

Internal consistency—Petitioners claim error by reason of the fact that the County did not amend the Brinnon Subarea Plan to show the area provided as a master planned resort and as such the Comprehensive Plan, which included the Brinnon Subarea Plan, is not internally consistent as required by RCW 36.70A.070 (preamble).

¹ "Before making a report and recommendation, the commission shall hold at least one public hearing on the proposed plan, change or addition." RCW 36.70.430.

ORDER ON REVIEW – 8

57577-0007/LEGAL16332741.1
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1 The record shows that the Pleasant Harbor Master Planned Resort covers
2 only a portion of the area approved in the Brinnon Subarea Plan for a future
3 master planned resort. Petitioners have identified no provision that requires
4 Jefferson County to modify the subarea plan to reduce the scope of potential
5 master planned resorts to that limited area covered by the Pleasant Harbor
6 proposal. As such, Petitioners have failed in their burden of proof to
7 demonstrate that the decision of the Growth Board was legally in error by
8 reason of any internal inconsistency.
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14 **Building intensity**—Petitioners claimed that RCW 36.70A.070(1)
15 requires the County to specifically identify building intensity in the
16 Comprehensive Plan and that by failing to do so the County failed to comply
17 with the GMA. Petitioners argued that the Growth Board decision upholding
18 the County decision was in error.
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25 The record demonstrates that the Comprehensive Plan does include
26 policies that would guide future building intensities. While there are a number
27 of policies that would guide future building intensities, the one most obvious to
28 this Court is included in the text amendment, which specifically referenced the
29 amendment proceedings that did include a more detailed description and that
30 limits the overall building intensity for the property to 890 units. Petitioners
31 have not demonstrated that the Growth Board erred when it concluded that the
32 County complied with RCW 36.70A.070(1).
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41 **SEPA**—Petitioners make two challenges to the adequacy of the FEIS
42 and SEPA process and the Growth Board's failure to find the FEIS and SEPA
43 process inadequate.
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1 The first claim is that the FEIS failed to consider an alternative with less
2 environmental impact.

3 The Growth Board found that the FEIS considered both the no action
4 alternative and two other alternatives that the County Environmental Review
5 Officer considered reasonable. The FEIS concluded the MPR proposed by
6 Pleasant Harbor could, with identified conditions, adequately mitigate potential
7 environmental impacts.
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12 An FEIS is to consider a reasonable number of alternatives, but where as
13 here the impacts of a specific proposal can be adequately mitigated there is no
14 duty to consider a smaller proposal with less potential impact. The adequacy
15 of an FEIS is governed by the "rule of reason" and adequacy is determined as a
16 matter of law. Petitioners have not demonstrated that the scope of the FEIS
17 review was inadequate as a matter of law.² Petitioners failed to demonstrate
18 that the Growth Board was in error in upholding the environmental review, or
19 in showing this Court why the FEIS was erroneous as a matter of law for
20 failure to consider additional alternatives.
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31 The second claim is that the County had a legal duty under WAC 197-
32 11-660 to identify the specific SEPA policies in support of each condition
33 imposed by the County and failure to do so was legally in error, requiring this
34 Court to void the ordinance.
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39 The Growth Board concluded that WAC 197-11-660 does not require
40 that a specific SEPA policy be cited to support each condition. Petitioners
41 have not demonstrated why this interpretation is an error. Similarly,
42 Petitioners did not provide any case law to support their argument that the
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² There is no evidence in this record that Petitioners objected to the publicized scoping notice or final scope approved by the County.

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County's use of its police powers to impose the challenged conditions was unlawful. Additional conditions imposed by the Commissioners addressed both environmental and economic policy considerations in response to public concerns and were not challenged by the applicant. No basis has been demonstrated to support the claim of error.

Summary and Conclusion

1. The Court had jurisdiction over the matter.

2. Petitioners had the burden of proof to demonstrate that the Growth Board erred in reaching its decision and that SEPA compliance was inadequate.

3. Petitioners generally challenged findings in their Petition for Review, but no evidence or argument was presented to support their claim that the findings were not supported by substantial evidence. Petitioners' claim that the findings were in error is denied for failure to meet their burden of proof.

4. The Growth Board did not err in concluding public participation requirements were met. The findings of ample participation are supported by the record and the changes made by the County Commissioners are within the range of matters considered by the FEIS and as such no further public hearing or comment is required. RCW 36.70A.035(b)(i) and (ii). As a result, no referral to the Planning Commission for additional hearing pursuant to RCW 36.70.430 was required. The Petitioners' claim that the Growth Board erred in concluding that the County met its public participation obligation must be denied for failure to carry the burden of proof necessary for reversal.

5. Petitioners also challenged the amendment's compliance with GMA requirements addressing internal consistency and building intensity as well as the County's compliance with SEPA. After reviewing the record and

ORDER ON REVIEW – 11

57577-0007/LEGAL16332741.1
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1 listening to the arguments of counsel the Court concludes that Petitioners have
2 failed to carry their burden of demonstrating that the Growth Board's
3 conclusions were erroneous or that the County SEPA compliance was
4 inadequate. Because this burden was not met, the court did not determine
5 whether SEPA authorizes an independent SEPA review.
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8 Having considered the claims of Petitioners and finding no basis for
9 error, the decisions of the Western Washington Growth Management Hearings
10 Board are affirmed and the appeal of Petitioners Brinnon Group *et al.* is
11 denied. Costs and fees shall be awarded as provided by statute.
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ORDER ON REVIEW – 12

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Order on Motions:

Respondent's motion to strike the declaration filed with
Petitioners' Brief is granted without prejudice to raise the matter with the Court
of Appeals

Petitioners' motion to file post hearing supplemental authority is
denied without prejudice to raise the matter with the Court of Appeals.

Dated: June 30, 2009

RICHARD D. HICKS

Judge Richard Hicks

Presented by:

Perkins Coie LLP

By: 

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AMackie@perkinscoie.com

John T. Cooke, WSBA No. 35699

JCooke@perkinscoie.com

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Attorneys for Respondent

Pleasant Harbor Marina and Golf Resort, LLP

and Pleasant Harbor Marina, LLC

JEFFERSON COUNTY

By:  (per email authorization)

David W. Alvarez, WSBA No. 29194

Chief Civil DPA for Jefferson County

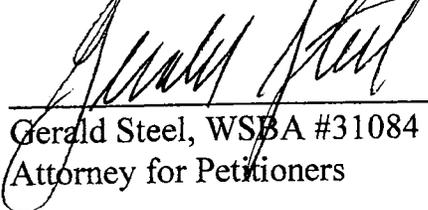
ORDER ON REVIEW – 13

57577-0007/LEGAL16332741.1

57577-0007/LEGAL16428062.1

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1 Approved as to form;
2 Notice of presentation waived;

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5 
6 _____
7 Gerald Steel, WSBA #31084
8 Attorney for Petitioners
9

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ORDER ON REVIEW – 14

57577-0007/LEGAL16332741.1
57577-0007/LEGAL16428062.1

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FILED
CLALLAM CO CLERK

2009 MAR -9 A 9 05

BARBARA CHRISTENSEN

THE HONORABLE GEORGE WOOD

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLALLAM COUNTY

BRINNON GROUP and BRINNON MPR
OPPOSITION,

Plaintiffs,

v.

JEFFERSON COUNTY, STATESMAN
GROUP OF COMPANIES LTD., BLACK
POINT PROPERTIES LLC, G. P.
BYRKIT, P & N BYRKIT FAMILY
TRUST, PALMER and NANCY BYRKIT,
WILLIAM KAUFMAN, VF MANKE
TRUST, JOAN MANKE, CHARLES and
JUDITH MANKE, and HAL and JANICE
RICHARDS, and STATE DEPARTMENT
OF NATURAL RESOURCES,

Defendants.

No. 08-2-00127-2

ORDER DENYING PLAINTIFFS' MOTION
TO STAY AND DISMISSING
PLAINTIFFS' COMPLAINT WITH
PREJUDICE

THIS MATTER came before the Court on November 14, 2008. The parties were
represented by their attorneys of record. The Court considered the following documents:

ORDER - 1

57577-0005/LEGAL14938229.1

ORIGINAL

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SCANNED - 10

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1 1. Plaintiffs Brinnon Group and Brinnon MPR Opposition's Verified Complaint for
2 Constitutional Writ of Certiorari and Statutory Writ of Review including the three attached
3 Exhibits;
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6 2. Plaintiffs Brinnon Group and Brinnon MPR Opposition's Amendment to Verified
7 Complaint for Constitutional Writ of Certiorari and Statutory Writ of Review;
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9
10 3. Defendant Statesman Group of Companies Ltd.'s Answer and Affirmative
11 Defenses to Verified Complaint for Constitutional Writ of Certiorari and Statutory Writ of
12 Review;
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15 4. Defendant Statesman Group of Companies Ltd.'s Motion to Dismiss Plaintiffs'
16 Complaint;
17
18

19 5. The Declaration of John T. Cooke with the following attachments:
20

21 a. Plaintiffs Brinnon Group and Brinnon MPR Opposition (Brinnon)
22 Petition for Review filed with the Western Washington Growth
23 Management Hearing Board (Growth Board);
24

25 b. The Pre-Hearing Order (amended) dated May 16, 2008 issued by
26 the Growth Board;
27

28 c. Brinnon's Opening Brief before the Growth Board;
29

30 d. Defendant Statesman's Response Brief (Intervenor's Prehearing
31 Brief) before the Growth Board.
32

33 6. Brinnon Response to Statesman Motion to Dismiss Complaint;
34

35 7. The Third Declaration of Gerald Steel with the following attachments:
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37 a. The Growth Board's Final Decision and Order dated September 15,
38 2008;
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40

1 b. The Planning Commission's recommended map amendment for the
2 Brinnon MPR;
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4 c. The Brinnon MPR map as adopted by the BOCC in Ordinance No.
5
6 01-0128-08.
7

8
9 8. Brinnon's Motion to Stay the Proceedings;

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11 9. The Fourth Declaration of Gerald Steel and the following attachment: Brinnon's
12 Petition for Review of Agency Decision Pursuant to RCW 36.70A.300(5) dated November
13 10, 2008 with its attached Exhibits A and B;
14

15
16 10. Defendant Statesman Group of Companies Ltd's Response to Plaintiffs' Motion
17 to Stay;
18

19
20 11. Defendant Statesman Group of Companies Ltd's Reply in Support of its Motion
21 to Dismiss;
22

23
24 12. Three page document provided to Judge Wood at Motion Hearing consisting of
25 pages 1-17, 1-19, and 1-20 from the Jefferson County Comprehensive Plan;
26

27
28 13. Brinnon's Statement of Additional Authorities.
29

30 After hearing the arguments of counsel, and being fully advised of the parties'
31 respective positions the Court issued a Memorandum of Opinion filed on December 17,
32 2008. A copy of the Memorandum of Opinion is attached to this Order and incorporated by
33 reference.
34

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36 NOW THEREFORE, it is ORDERED, ADJUDGED and DECREED that:
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39 1. Brinnon's Statement of Additional Authorities is accepted;
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42 2. Plaintiffs' Motion to Stay is denied;
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45 3. Defendant Statesman Group of Companies, Ltd's Motion to Dismiss
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47 Plaintiffs' Complaint is granted; and

ORDER - 3

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SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

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BARBARA CHRISTENSEN, Clerk

BRINNON GROUP, et al.,)
)
Plaintiffs,)
vs.)
)
JEFFERSON COUNTY, et al.,)
)
Defendants.)
)

NO. 08-2-00127-2

MEMORANDUM OPINION RE
MOTION TO DISMISS

In February 2006 Statesman submitted an application for a site-specific amendment to the Jefferson County Comprehensive Plan. The Board of County Commissioners (BOCC) enacted Ordinance No. 01-0128-08 on January 28, 2008. The Ordinance amends the Comprehensive Plan by providing for a site-specific amendment relative to Statesman's application. On February 18, 2008 Plaintiff filed the present complaint seeking to void the Ordinance by statutory and constitutional writs of review. Plaintiff alleges that the Ordinance is invalid because of a violation of the public participation provisions of the Planning Enabling Act, RW 36.70.

On August 12, 2008 the Plaintiffs filed a motion to dismiss the complaint on grounds that the Plaintiffs are not entitled to a writ of review "because they have not exhausted their available Administrative Remedies." Said motion is based upon the following facts which are not significantly in dispute:

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1. On March 19, 2008 the Plaintiffs filed a Petition for Review with the Growth Management Hearings Board (GMHB), challenging the BOCC decision relative to Statesman's application.
2. After a hearing, the GMHB issued a final Decision and Order dated October 14, 2008.
3. In its final Decision and Order the Hearings Board specifically addressed the Plaintiffs argument that the public participation provision (RCW 36.70.430), of the Planning Enabling Act was violated in the adoption of Ordinance No. 01-0128-08. The Board assumed jurisdiction "to review whether the county has complied with these provisions as a means of satisfying the GMA's public participation program provisions". (Page 7)

The Board Noted:

"While the Board does not have jurisdiction over Chapter 36.70 RCW, the Planning Enabling Act, where the county has imposed the requirements of the Planning Enabling Act upon itself as part of its process for adopting site-specific plan amendments pursuant to RCW 36.70A.140, the Board has jurisdiction to review whether the county has complied with these provisions as a means of satisfying the GMA's public participation program provisions." (Page 7)

4. The Hearings Board reviewed the provisions of RCW 36.70.430 and concluded, based upon the record, that the Plaintiffs had failed to demonstrate noncompliance. (Page 8 and 9)
5. On November 10, 2008 the Plaintiffs filed a petition for review of the Hearings Board's decision with the Thurston County Superior Court.

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A writ or review, either constitutional or statutory, will not lie when there is an adequate remedy at law. A writ of certiorari is an extraordinary remedy granted at the discretion of the Court “but it is not available when a party has failed to avail itself to other procedures that would have afforded the opportunity for an adequate remedy.” Torrance v. King County, 136 Wn. 2d 783, 793 (1998); Snohomish County v. Shorelines Board, 108 Wn. App. 781, 785 (2001).

The Defendants argue that the Plaintiffs had an adequate remedy before the GMHB, i.e. that had the Board made a finding that the BOCC had failed to comply with the procedures contained within the Planning Enabling Act, the site-specific amendments contained within the Ordinance would be declared invalid and would not be enforceable by the County pending further action on remand, thus granting to the Plaintiffs the same ultimate relief they are now seeking before this Court. The Plaintiffs counter that the writ process is the only remedy available to void the Ordinance for noncompliance with the Planning Enabling Act.

According to RCW 36.78.300, if the GMHB finds noncompliance, it shall remand the matter to the county, which must then correct the error and comply with the requirements of the GMA. Torrance v. King County at 789. The Board’s finding of noncompliance may also contain a determination that the ordinance or regulation, or parts thereof, are invalid. Such a finding of invalidity prevents the operational

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application of the ordinance or regulation during the period of remand. RCW 36.70A.300.

The critical inquiry in the present case is whether appeal of the GMHB's decision to the Thurston County Superior Court provides the Plaintiffs with an "adequate remedy". While the requested reliefs may not be identical, i.e. invalidity versus void, the substantive relief available to Plaintiffs on appeal of the Hearings Board's decision is essentially the same as that available through the writ process. If on appeal the court in Thurston County reverses the Hearings Board then the matter will be remanded to the County for compliance and the Ordinance may be declared invalid pending compliance on remand. A review by writ essentially leads to the same result, i.e. the Ordinance is declared void for noncompliance, requiring the county to correct its noncompliance in the enactment of any future ordinance.

In the case of Torrance v. King County, *supra*, the Court addressed a similar issue as to the adequacy of the Plaintiff's remedy at law. The Court reversed the Superior Court which had granted a constitutional writ of certiorari.

"Judicial review of a GMHB decision under RCW 36.70A.300(5) and RCW 30.05.570 provides an aggrieved party the opportunity for adequate and complete relief from a GMHB decision. In this case, an appeal of the Board's decision to Superior Court would have provided Torrance with an opportunity to pursue the remedy he desired." 136 Wn. at 793.

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The Plaintiffs also appear to argue that the GMHB had no authority to review compliance with the Planning Enabling Act, making the writ process the only available remedy. According to the final Decision and Order it was the Plaintiffs' argument before the Board which helped convince it to assume jurisdiction of the issues involving the Planning Enabling Act.

“However, Petitioners point to a provision of the County Comprehensive Plan which provides that the process for adopting site-specific amendments to the plan shall incorporate ‘the procedures contained within Chapter 36.70 RCW in the Jefferson County development regulations . . .’” (Page 7)

In accepting the Plaintiffs argument, the Hearings Board found that where the County had specifically incorporated RCW 36.70 into its process for adopting site-specific plan amendments pursuant to the GMA the Board had jurisdiction to review compliance with the Enabling Act. With Plaintiffs having urged the Hearings Board to adopt this position it would be inappropriate for the Court to now entertain a contrary position. Furthermore, the Court finds that the Hearings Board's analysis of jurisdiction is correct in light of the County's incorporation of the Planning Enabling Act within its process for site-specific amendments under the GMA.

The Plaintiffs chose their forum, presenting to the Hearings Board the same or substantially the same argument of noncompliance it now makes on its petition before this Court. In addition, the facts reviewed by the Thurston County Superior Court will

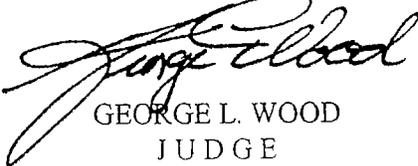
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be identical to those reviewed by this Court. Thus, Plaintiffs will have the benefit of all the facts and the substance of all of its arguments before the Court on its appeal in Thurston County.

Therefore, it is the Court's finding that the Plaintiffs have an adequate remedy through appeal of the Hearings Board's Final Order and Decision dated October 14, 2008. The Plaintiffs lose nothing by dismissal except the opportunity to argue their case in yet another forum.

The Court will enter an order of dismissal upon presentation duly noted.

DATED this 17th day of Dec., 2008.


GEORGE L. WOOD
JUDGE

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Attorney for State Department of Natural Resources

Joseph V. Panesko
Assistant Attorney General
P.O. Box 40100
Olympia, WA 98504-0100

and the following who did not appear in the proceedings before this court:

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6606 Young Rd. NW
Olympia, WA 98502-9319

Hal and Janice Richards
PO Box 626
309273 Highway 101
Brinnon, WA 98320

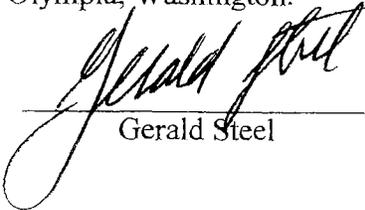
William Kaufman
KMC Investment Group LLC
306 SE 15th St.
Gresham, OR 97080-9365

Black Point Properties LLC
G. P. Byrkit
PO Box 91597
Portland, OR 97291-0597

P & N Byrkit Family Trust
Palmer and Nancy Byrkit
PO Box 91597
Portland, OR 97291-0597

VF Manke Trust
Joan M. Manke
1717 Marine View Dr.
Tacoma, WA 98422-4104

Dated this 2nd day of April, 2009, at Olympia, Washington.



Gerald Steel

Br4a2.09

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that, on December 21, 2009, she caused to be served on the person(s) listed below in the manner shown:

RESPONSE BRIEF; APPENDIX

Gerald Steel,
Gerald Steel, P.E.
7303 Young Road NW
Olympia, WA 98502

Attorney for Petitioner

David Alvarez
Jefferson County Prosecutor's Office
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Attorney for Respondent Jefferson
County

Joseph V. Panesko
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Olympia, WA 98504-0100

Attorney for Respondent State
Dept of Natural Resources

Jerald R. Anderson
Assistant Attorney General
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Attorney for Growth Board

United States Mail, First Class

By Messenger

By Email

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COURT OF APPEALS
DIVISION II
09 DEC 21 PM 2:20
STATE OF WASHINGTON
BY _____
DEPUTY

Dated at Seattle, Washington, this 21st day of December, 2009.



Suzanne Nelson