

No. 31578-5-II

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

FRIENDS OF THE SAN JUANS, LYNN BAHRYCH, JOE
SYMONS, AND MAILE JOHNSON,

Respondent,

vs.

SAN JUAN COUNTY,

Appellant.

BRIEF OF APPELLANT

The Honorable Randall K. Gaylord
San Juan County Prosecuting Attorney

Philip J. Buri, WSBA #17637
Special Deputy Prosecutor
Buri Funston PLLC
1601 F Street
Bellingham, WA 98225
360/752-1500

Attorneys for Appellant

TABLE OF CONTENTS

INTRODUCTION 1

I. ASSIGNMENTS OF ERROR 4

II. STATEMENT OF FACTS. 6

 A. The County Faces Development Challenges
 Unlike Any Other in the State 6

 B. Guesthouses and Accessory Apartments Play
 A Vital Role In the Islands 10

 C. San Juan County's Development Regulations
 Assure Guesthouses Will Not Create
 Urban Sprawl 12

ARGUMENT 13

III. STANDARD OF REVIEW 13

**IV. THE HEARING BOARD ERRED BY USING A FIXED FORMULA
TO INVALIDATE AN ORDINANCE TAILORED FOR THE
SAN JUANS. 14**

 A. Guest Houses and Accessory Apartments Are
 Not Equivalent to Single Family Homes 15

 B. The Board's Decision Conflicts With The Housing
 Policy Act 16

 C. The Board's Bright Line Density Formula Has,
 And Should Have, Exceptions 19

 D. The Board's Decision Conflicts With The Growth
 Management Act 21

CONCLUSION 26

TABLE OF AUTHORITIES

Washington State Court of Appeals

Whidbey Environmental Network v. Island County, ___ Wn.
App. ___, 93 P.3d 885 (2004)..... 6, 14, 24, 25

Other Authorities

Town of Friday Harbor v. San Juan County, WWGMHB
99-2-0010C 7, 9

Durland v. San Juan County, WWGMHB 00-2-0062c 8, 9

Coalition of Responsible Disabled v. City of Spokane, EWGHB
95-1-0001.....18, 19

Codes and Regulations

RCW 34.05.570(3)..... 4

RCW 36.70A.020 1

RCW 36.70A.070(5)(b) 6

RCW 36.70A.011 2, 22, 23

RCW 43.63A.215(3)..... 5, 17

RCW 43.185B.005 17

RCW 43.185B.007 17

WAC 365-195-70518

San Juan County Code 18.20.040 5, 14

San Juan County Code 18.40.240 2, 12, 13

INTRODUCTION

Can homeowners in rural San Juan County build a guesthouse or accessory apartment next to their main house? According to the Western Washington Growth Management Hearings Board, owners anywhere in the County may construct guesthouses attached to the main house. But a *detached* guesthouse on a rural lot of less than 10 acres, in the Board's view, is urban growth and illegal under the Growth Management Act. (Corrected Final Decision and Order at 25; CP 140; Attached as Appendix A). Because the Hearings Board's decision outlawing detached units was in error, San Juan County now appeals.

This appeal presents an inherent tension within the Growth Management Act, RCW Ch. 36.70A. Without establishing priorities, the Act on the one hand directs local governments to "reduce the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW 36.70A.020(2). On the other hand, it directs local government to "encourage...affordable housing to all economic segments of the population...[with] a variety of residential densities and housing types." RCW 36.70A.020(4).

These goals are particularly critical for rural areas. The Act encourages local governments to "foster land use patterns and

develop a local vision of rural character that will help preserve rural-based economies and traditional rural lifestyles.” RCW 36.70A.011. San Juan County balanced these goals when it strictly regulated a traditional source of housing in the Islands – a guesthouse. Under its Accessory Dwelling Unit (ADU) Ordinance, SJCC 18.40.240, the County limited attached or freestanding accessory units to 1000 square feet, and required homeowners to minimize its visual and environmental impact. (SJCC 18.40.240 attached as Appendix B). The County simultaneously protected a traditional source of affordable, flexible rural housing while preventing inappropriate development of rural lands.

The Hearings Board invalidated this Ordinance with a blanket prohibition: detached guesthouses are a second dwelling and rural density prohibits more than one dwelling unit per five acres. “[A]llowing freestanding ADUs together with a principal residence on lots of less than ten acres in rural areas constitute inappropriate urban growth in a rural area.” (Corrected Final Decision and Order at 26; CP 140). This inflexible formula does not appear in the Growth Management Act, and when applied to a guesthouse, conflicts with the Legislature’s mandate that local governments protect appropriate development in rural areas.

Guesthouses are a critical source of housing in the Islands. San Juan County is predominantly rural but has the highest housing prices in the State by far. Small detached guesthouses serve an important purpose by adapting to different uses during an owner's life. They are often the only affordable rental units available to young people in the islands. At middle age, guesthouses provide space for family, visitors and friends during the popular summer months. Finally, at later stages of life, they house live-in caretakers or support semi-independent living with family members living in the main house. Given the economic constraints of the San Juan Islands, guesthouses supply the most flexible solutions in a tight, ever-escalating housing market.

Petitioner San Juan County respectfully requests this court to reverse the decisions of the trial court and Growth Management Hearings Board. There is no principled distinction between an attached and detached accessory unit. Detached guesthouses, like their attached counterparts, are not a separate "dwelling unit" under the Growth Management Act and do not promote urban sprawl in the Islands.

I. ASSIGNMENTS OF ERROR

The Western Washington Growth Hearings Board's conclusion that "a freestanding ADU should be considered as one dwelling unit" is an erroneous interpretation of the law, not supported by substantial evidence and arbitrary and capricious under RCW 34.05.570(3). (Corrected Final Decision and Order at 26; CP 140).

The Thurston County Superior Court erred in its Order Affirming in Part and Reversing in Part Agency by ruling that "detached ADUs in rural and resource lands be counted as a separate dwelling unit for density calculation purposes." (Order ¶ 2; CP 461).

San Juan County's appeal presents four issues:

A. The Hearings Board ruled that a "freestanding ADU is a separate dwelling unit and has all the structural characteristics of the dwelling unit, whether it is owned by the owner of a principal residence or not." (Corrected Final Decision and Order at 25; CP 140). The San Juan County Code places strict requirements on all accessory units, limiting their size, ownership, location, visual impact, number of occupants, and use of driveways and utilities. Does the Growth Management Act support the Board's assertion

that a detached guesthouse is a second dwelling unit, while an attached guesthouse is not?

B. The 1993 Washington Housing Policy Act required San Juan County to permit accessory apartments “subject to such regulations, conditions, procedures, and limitations as determined by the local legislature authority.” RCW 43.63A.215(3). The Hearings Board ruled that detached accessory apartments are illegal under the Growth Management Act on any rural parcel less than ten acres. Does this blanket prohibition conflict with the goals and mandates of the Housing Policy Act?

C. San Juan County counts a main house and an attached or detached guesthouse as one “dwelling unit.” SJC 18.20.040. The Growth Management Hearings Board struck down this zoning decision, concluding that a free-standing guesthouse is a separate dwelling unit that doubles the density of a rural lot. (Corrected Final Decision and Order at 26; CP 140). Did the Hearings Board err by concluding that a detached guesthouse is a second residence on the property?

D. In the 2002 amendments to the Growth Management Act, the Washington Legislature encouraged counties to use “clustering, density transfer, design guidelines, conservation

easements, and other innovative techniques [to] accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.” RCW 36.70A.070(5)(b). The Court of Appeals recently concluded “[u]nder the GMA, the County can account for unique local conditions in drafting its regulations [for rural zoned lands].” Whidbey Environmental Network v. Island County, ___ Wn. App. ___, 93 P.3d 885, ___ (2004). Did the Hearings Board err by using a generic density formula to invalidate San Juan County’s accessory dwelling unit ordinance, tailored to the unique conditions of the Islands?

II. STATEMENT OF FACTS

A. The County Faces Development Challenges Unlike Any Other in the State

Calling the San Juan Islands unique is an understatement.

As the Growth Hearings Board detailed in an earlier opinion,

The land area of [San Juan] County totals approximately 175 square miles and the salt water shoreline some 375 miles. It is the smallest County in the state in terms of land area, and the largest in the nation in terms of saltwater shore area. About 20 of the islands have year-round residents, but most of the population is concentrated on the four ferry-served islands: Shaw, Lopez, Orcas and San Juan. Almost 50% of the people live on San Juan Island, which

includes the town of Friday Harbor. Only about 15% of the County's 12,500 full-time residents live within the town.

Town of Friday Harbor v. San Juan County, WWGMHB 99-2-0010C

(July 21, 1999).

San Juan County is predominantly rural, providing limited areas for intense urban development. Because of its location, it has the highest housing prices in the State.

The State average of real property value per capita is \$61,057. Jefferson County has the number two ranking throughout the state with the real property value per capita of \$82,840. San Juan County is number one with almost three times that of Jefferson County; a value per capita of \$215,067.

Town of Friday Harbor, supra, at 1. The 2000 median sales price for a home in San Juan County was \$280,000, still the highest in the state. (Administrative Record (AR) 1463; CP 39).* County residents, officials and employers list affordable housing as one of their greatest concerns.

Although the County has a disproportionate number of people with high incomes, the average worker has one of the lowest net earnings per worker of all Washington counties. In 1997, San Juan County had the second highest per capita income,

while its average annual wage ranked only 35th out of 40 counties. (AR 1462; CP 39). And the County lacks a significant middle class. The County is largely made up of wealthy retirees and those dependent on the tourism economy that live hand-to-mouth.

Affordable housing is most scarce in the County's rural areas, where the GMA requirements of low densities limit the supply of small affordable lots. (AR 1464; CP 39). The Growth Hearings Board recently acknowledged that providing affordable housing in rural areas is a significant challenge.

The record is clear that, absent some subsidized funding mechanism, development and significant affordable housing in rural areas in San Juan County is not now likely to occur nor is there much chance of it in the future given the price of property in San Juan County.

Durland v. San Juan County, WWGMHB 00-2-0062c, Final Decision and Order, at 31 (May 7, 2001). The Growth Board warned:

[t]he County is facing the dilemma of making sure that it does not become a "rural museum piece" ... the rural character requirements of RCW 36.78.070(5)(b) and (c), as well as the definition contained in RCW 36.78.080(14), involves more than just preservation of the "natural" part of the rural area. Rather, while a county must assure that the "natural landscape"

* The Thurston County Clerk did not give CP cites to the pages of the Administrative Record. All citations are to the Administrative Record number and the CP cite for the Certification of the Record.

predominates, it also has a duty to “foster traditional rural lifestyles, rural based economies, and opportunities to both live and work in rural areas.”

Durland, Final Decision and Order at 24.

Tourism is by far the County’s largest industry. (AR 1461; CP 39). The Islands have a state-wide – even national – reputation for pristine beauty. In 1997, tourists contributed \$84.3 million to the local economy, and the County’s rural character and beauty undoubtedly plays a significant role in drawing tourists. (AR 1462; CP 39). The archipelago is a noteworthy exception to the typical vacation destination – it has no major shopping areas, large resorts or commercial tourist attractions. If not for the beauty of its landscape, outdoor recreation and unspoiled character, this physically isolated corner of the state would not have anywhere near its thriving ecotourism economy. Most of San Juan County’s visitors are trying to get away from it all, to find solitude, tranquility and nature in one of the few coastal communities that is not heavily developed.

Developing affordable housing appropriate for the Islands is a complicated business. Any program must simultaneously balance: (1) high prices for land and existing homes; (2) low wage rates; (3) an economy dependent on ecotourism; and (4) property

predominantly zoned rural residential. Out of these often conflicting forces San Juan County has arrived at a solution that provides affordable housing while protecting the Islands' rural character and beauty – guesthouses.

B. Guesthouses and Accessory Apartments Play A Vital Role In the Islands.

Guesthouses offer flexible, affordable housing that fits with existing rural development and land use. First, they are affordable rental properties for wage earners. Second, they adapt to different, vital uses during a resident's life.

Guesthouses traditionally provided affordable rental housing for workers on the Islands. Accessory units contribute to the rural economy, allowing more employees to live in the Islands rather than commuting from the mainland. Property owners receive supplemental income from renting guesthouses. (AR 1462; CP 39). While renting out guesthouses for additional income may not be a priority for the County's most affluent homeowners, it is an important source of income for the less affluent homeowners and helps offset the high cost of property and housing.

They are also an accepted part of island life. Accessory dwellings have a long history in San Juan County and vary widely

in appearance and structure. (AR 1445; CP 39). Most property owners build guesthouses to accommodate visiting family and friends. (AR 1429; CP 39). Other property owners rent their guesthouses long-term, and a smaller number of owners lease them short-term as vacation rentals. In a tourist economy characterized by high property values and scarce rental housing, guesthouses and accessory apartments supply vital housing choices for Island residents.

Second, accessory apartments furnish flexible housing throughout a property owner's life. During the first years on the island, a guesthouse may be a resident's only affordable rental housing. When someone first buys property on the island, the guesthouse may be the initial dwelling while building the main house. Once the main house is built, a guesthouse may contribute rental income to offset the high cost of land and construction. During a resident's middle years and early retirement, guesthouses are a place for friends and family to visit as well as a separate living space for elderly parents. Finally, when the owners themselves need assistance, a guesthouse can be a living space for a caretaker or a place for the owner when his or her children move into the main house.

Accessory apartments have a long tradition in other communities. With San Juan County facing the same problems of expensive land and scarce housing, guesthouses and accessory apartments supply an affordable, less intrusive way to increase the number of places to live.

C. San Juan County's Development Regulations Assure Guesthouses Will Not Create Urban Sprawl.

San Juan County's development code for accessory dwelling units, SJCC 18.40.240, limits the size, location and ownership of a guesthouse or accessory apartment. These limitations include:

- An accessory dwelling unit shall not exceed 1,000 square feet in living area;
- An accessory dwelling unit shall be served by the same driveway as the principal resident unless site conditions warrant a separate access;
- Owners must locate new freestanding guesthouses outside of the most sensitive open-space features of the site;
- The same water system and driveway must serve the principal residence and free-standing ADU unless separate systems or driveway would have fewer impacts to the environment;
- Owners must maintain existing orchards, meadows and pasture areas;
- Owners must leave ridge lines and contrasting edges between landscape types unbroken by structures;

- On rolling open or steep open slopes, owners must locate new free-standing ADUs so that the buildings would be screened by existing vegetation or terrain;
- Owners must ensure protection of features such as wetlands and wildlife habitat; and
- Accessory dwelling units must be owned by the owner of the single family residence.

(SJCC 18.4.240 (a) through (f); attached as Appendix B).

These design restrictions minimize the environmental footprint of an accessory unit and tie the guesthouse visually and structurally with the main residence. Because preserving the rural character of the Islands is critical to its livelihood, the County has adopted strict, well-defined criteria for building guesthouses. These will help preserve, not detract from, the County's rural character.

ARGUMENT

III. STANDARD OF REVIEW

When reviewing a Hearings Board's order,

[o]n appeal we base our review on the record before the Board. We apply the standards of RCW 34.05 [the Administrative Procedure Act] directly to the record before the agency, sitting in the same position as the Superior Court.

... This court reviews the Board's legal conclusions de novo. We accord deference to the Board's interpretation of the law, but its interpretations are not binding.

Whidbey Environmental Network v. Island County, ___ Wn. App. ___, 93 P.3d 885, ___ (2004).

IV. THE HEARINGS BOARD ERRED BY USING A FIXED FORMULA TO INVALIDATE AN ORDINANCE TAILORED FOR THE SAN JUANS

The dispute between the Hearings Board and the County arose as a disagreement over the definition of a “dwelling unit.” The Hearings Board counts a detached guesthouse as an additional unit. The County does not:

“Dwelling unit” means one or more rooms or structures designed for occupancy by an individual or family, which contain kitchen facilities, sleeping quarters and sanitary facilities, for use solely by the dwelling’s occupants. A main residence in an accessory dwelling unit that meets the requirements of SJCC 18.40.240(a) constitute a single dwelling unit.

SJCC 18.20.040 (appendix B).

The Growth Hearings Board invalidated San Juan County’s ordinance with this logic: First, earlier Hearings Board decisions had determined that the maximum development for rural areas is one dwelling unit per five acres. Second, detached guesthouses are a separate dwelling unit from the main house. Third, permitting detached guesthouses on lots less than ten acres would double the density of rural lands, violating the Growth Management Act’s prohibition against urban sprawl.

As the Hearings Board concluded,

In the areas where residential use is allowed in rural lands, allowing a freestanding ADU with the principal residence on lots less than ten acres creates a density of greater of one dwelling unit to five acres. Densities of greater than one dwelling unit to five acres are not rural densities. Both this Board and the Central Board have consistently said that densities of more than one unit per five constitutes urban growth. (The Eastern Board has indicated that densities of more than one unit per ten acres of land are not a rural density). Therefore, allowing freestanding ADUs together with a principal residence on lots than less than ten acres in rural areas constitutes inappropriate urban growth in a rural area.

(Corrected Final Decision and Order at 25-26; CP 140).

The Board's decision is flawed for four reasons: (1) detached guesthouses are not a separate dwelling unit equivalent to a single-family home; (2) the Board's ruling conflicts with the goals and mandates in the Housing Policy Act; (3) the Board's density formula has, and should have, exceptions; and (4) the Board's decision conflicts with the Growth Management Act.

A. Guesthouses And Accessory Apartments Are Not Equivalent To Single Family Homes.

The technical dispute in this case is what constitutes a "dwelling unit". The Growth Management Act does not define that term. But the more important issue animating this technical dispute is whether building an accessory dwelling unit is so comparable to

constructing a new home that it doubles the density of a rural lot. Under San Juan County's strict guidelines, neither an attached nor a freestanding guesthouse does that. A total living area of 1,000 square feet can accommodate one or maybe two adults, not a large family. In addition, because the same driveway and utilities serve the main house and guesthouse, the residents of both are typically either family members or people who get along. A guesthouse is truly an accessory dwelling dependent on the main house for many amenities.

Furthermore, a property owner cannot sell a guesthouse separately from the main house, and at best could only rent it long term. Many guesthouses are used infrequently or are inhabited year-round while the main house serves as a summer residence. Changing a four-unit apartment building into an eight-unit building doubles the density of development. Building a guesthouse, whether attached or detached from the main house, does not.

B. The Board's Decision Conflicts With The Housing Policy Act.

In 1993, the Washington Legislature recognized the acute shortage of affordable housing and directed counties to use guesthouses and accessory dwelling units as a solution. Both the

goals of the Act and its specific mandates support San Juan County's ordinance. The Legislature's findings are directly relevant to creating affordable housing in the Islands:

- Residents must have a choice of housing opportunities within the community where they choose to live;
- Land supplies a major contributor to the cost of housing;
- State and local government must continue working cooperatively towards the enhancement of increased housing units by reviewing, updating or removing conflicting regulatory language; and
- State and local government should work together in developing creative ways to reduce a shortage of housing.

RCW 43.185B.005. The Legislature declared that "a decent home in a healthy, safe environment" was a State priority "for every resident of the state." RCW 43.185B.007. This includes residents of San Juan County.

To put these broad statements into practice, the Legislature created an affordable housing advisory board *and* required cities and counties to create development regulations that allow one accessory apartment in single family zones. RCW 43.63A.215(3). The Legislature also directed the Washington Office of Community Trade and Economic Development (CTED) to develop a model

ordinance for accessory dwelling units. This model ordinance, which San Juan County followed, allows both attached and detached accessory dwelling units in all areas zoned for single-family housing. (AR 2125; CP 39). The Eastern Growth Hearings Board ruled that the Housing Policy Act “places a separate and additional mandate...to adopt an ADU regulation or control.” Coalition of Responsible Disabled v. City of Spokane, EWGHB No. 95-1-0001, Final Order at 3 (1995).

The CTED model ordinance established a limit of one ADU per residential lot. Because it drafted this ordinance at the Legislature’s direction, the CTED model ordinance should carry more weight than a typical recommendation from a state agency. It represents an official interpretation of the Housing Policy Act, entitled to substantial deference. WAC 365-195-705(1) (“where the legislature has spoken expressly on the relationship of the [GMA] to other statutory provisions, the explicit legislative directions shall be carried out”).

By invalidating San Juan County’s ordinance, the Hearings Board undercut the Housing Policy Act. The Board’s ban on free-standing guesthouses in rural properties less than ten acres restrains the most flexible and least intrusive means for providing

affordable housing in the Islands. It also countermands “the broad discretion to accommodate” the needs of the County “in designing these provisions.” Coalition of Responsible Disabled, supra, at 3. The County appropriately followed the dictates of the Washington legislature and CTED when it adopted its ordinance for guesthouses. The Board’s decision to invalidate the ordinance was legal error because it nullified the discretion given to County.

C. The Board's Bright line Density Formula Has, And Should Have, Exceptions.

The Board presents as a rule what is in practice a standard for defining rural lands. According to the Board, the definition of rural is no more than one dwelling unit per five acres. This standard is easy to express but difficult to apply in practice.

By equating density solely with dwelling units, the Board permits more intense development of rural lands as long as new buildings are not residences. For example, under the Board’s density formula a property owner could build a 10,000 square foot main house, a 2,000 square foot freestanding garage, a 5,000 square foot barn, and a 2,000 square foot bunk house (a building with heat, sanitation and sleeping quarters but no kitchen), all on the same five-acre parcel, and still meet the Growth Management

Act's density requirements. But if the same property owner builds a modest 2,000 square foot house and a small 1,000 square foot detached guesthouse, he or she would violate the Act.

The weakness with the Hearings Board's bright line rule is that it ignores the size, configuration, and intensity of development in favor of a simple calculation of dwelling units. Regardless of how big or where constructed, buildings that are not dwellings fall outside the Growth Management Act's restrictions. But a 1,000 square foot accessory guesthouse – if it does not share a common wall with the main house – transforms the five-acre parcel from rural land to urban growth. This does not make sense and distracts County planners from restricting development that undermines the rural character of the County.

In addition, the Board's proposed rule makes an unsupported distinction between attached and detached accessory units. The same reason for excluding attached units from density calculations exists for detached ones. Both are ancillary living spaces, dependent on the main house. They are not new single family residences on the same parcel.

According to the Board, a detached guesthouse is *structurally* indistinguishable from the main house. But the relevant

issue is the density of development on a particular parcel, not the number of bedrooms or people living there. The distinction between attached and detached guesthouses is an arbitrary one and has no support in the Growth Management Act. Instead, the Board adopted a compromise ruling, permitting internal and attached accessory dwelling units but outlawing those detached even by a few inches from the main house.

As described below, the Growth Management Act protects a more important aspect, but one more difficult to define – the rural character of County land. The Board’s bright line rule of one dwelling unit per five acres works to undermine the County’s rural character. Given the economic constraints of life in the islands, property owners will adopt more intensive non-residential development under the Board’s rule than less intensive residential development that the County promotes in its ordinance. The Growth Management Act does not impose a one-size-fits-all solution.

D. The Board’s Decision Conflicts With The Growth Management Act.

The Hearings Board’s prohibition on detached guesthouses also conflicts with the Legislature’s recent amendment to the

Growth Management Act. During the 2002 session, the Legislature defined through a series of legislative findings what development is appropriate in rural areas. RCW 36.70A.011. First, the Legislature underscored the need to respect the unique development of rural lands.

The legislature finds that this chapter is intended to recognize the importance of rural lands and rural character to Washington's economy, its people, and its environment, while respecting regional differences. Rural lands and rural based economies enhance the economic desirability of the State, help to preserve traditional economic activities, and contribute to the State's overall quality of life.

RCW 36.70A.011.

Second, the Legislature clarified that the Growth Management Act does not bar commercial development in rural areas.

The legislature finds that to retain and enhance the job base in rural areas, rural counties *must have flexibility to create opportunities* for business development. Further, the legislature finds that rural counties must have the flexibility to retain existing businesses and allow them to expand. The legislature recognizes that not all business developments in rural counties require an urban level of services; and that many businesses in rural areas fit within the definition of rural character identified by the local planning unit.

(RCW 36.70A.011) (emphasis added). Local governments and the Growth Hearings Board had interpreted the Growth Management Act too restrictively on allowable development within rural lands. The Act does not prohibit further development but rather requires that it be consistent with “the definition of rural character identified by the local planning unit.” RCW 36.70A.011.

Third, the Legislature granted counties the power to enhance their rural character through appropriate development.

Finally, the legislature finds that in defining its rural element under RCW 36.78.070(5), a county should foster *land-use patterns* and develop a *local vision of rural character* that will: help preserve rural based economies and traditional rural lifestyles; encourage the economic prosperity of rural residents; foster opportunities for small scale, rural based employment and self employment; permit the operation of rural based agricultural, commercial, *recreational and tourist businesses* that are consistent with existing and planned land use patterns; be compatible with the use of land by wildlife and for fish and wildlife habitat; foster the private stewardship of the land and preservation of open space; and enhance the rural sense of community and quality of life.

(RCW 36.78.011) (emphasis added).

San Juan County followed these findings to the letter. Its ordinance on accessory dwelling units promotes sustainable, low-impact development of attached and detached guesthouses, while protecting wildlife, the physical and visual landscape and the

unique rural character of the Islands. By invalidating this exercise of local discretion with a rigid formula, the Hearings Board acted contrary to the Legislature's findings and its direction that counties find local solutions for local development problems.

Given the goals of the Growth Management Act, the Housing Policy Act, and protecting the Islands' ecosystem, San Juan County adopted a balanced regulation to satisfy all these important aims.

The Court of Appeals recently upheld a similar local solution in Whidbey Environmental Action Network v. Island County, ___ Wn. App. ___, 93 P.3d 885, ___ (2004). The case began with the Growth Hearings Board invalidating Island County's development regulations and requiring the County to "adopt an interim rural density ordinance that would limit any subdivision to ten acre lots." Whidbey Environmental Action Network, 93 P.3d at ___. The County redrafted its ordinance, but rather than down-zoning rural lots, the County adopted a series of alternatives designed to allow five-acre parcels in certain areas.

On review, the Hearings Board approved the County's ordinance even though it did not comply with the Board's earlier ruling. As the Court of Appeals described,

The Board found most of the local conditions outlined by the County to be convincing reasons to depart from a downzoning requirement on rural zoned lands, including the densely populated nature of the county, and the fact that the County does not fit the prototypical GMA model because its three cities account for only four percent of the land area and 30 percent of the population. The Board also noted that, excluding land in the UGA's, the County only has 27,500 acres that can be divided into either 10-acre or 5-acre lots, and that for the last 30 years, land division has accounted for an inconsequentially small number of new lots.

Whidbey Environmental Action Network, 93 P.3d at ___. The Court of Appeals affirmed the Board's reasoning.

The Act does not require a particular methodology for providing for a variety of densities. And RCW 36.78.050 allows for consideration of local conditions and the use of unspecified "innovative techniques" to achieve rural densities and uses. But nowhere in the GMA is there any articulation or requirement that a pattern of significant block of large lands remain before relief will be granted.

Whidbey Environmental Action Network, 93 P.3d at ____.

San Juan County has used similar innovative techniques to provide affordable housing in the most expensive county in the state. Rather than barring this action, the Growth Management Act promotes it. The County protects against urban sprawl by limiting the amount and size of development in rural areas and by regulating its placement. The Islands' rural character includes

much more than simply the number of people living on a lot. By closely regulating the construction and placement of accessory dwelling units, the County protects its unique rural character and adopts a solution fitted to the County's needs. This is exactly what the Growth Management Act requires.

CONCLUSION

The Western Washington Growth Management Hearings Board struck down San Juan County's accessory dwelling unit ordinance to protect the County from urban sprawl and inappropriate rural development. But the ultimate consequences from this decision are the opposite of what the Board intended. San Juan County adopted its ordinance to provide the least intrusive and most compatible form of moderately-priced housing in the Islands. Any alternative will have greater repercussions.

Appellant San Juan County respectfully requests this Court to reverse the decision of the Growth Management Hearings Board and uphold the County's ordinance.

DATED this _____ day of August, 2004.

RANDALL K. GAYLORD
San Juan County Prosecuting Attorney

By _____
Philip J. Buri, WSBA #17637
Special Deputy Prosecutor
BURI FUNSTON, PLLC
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of the **Brief of Appellant** to:

Lynn Bahrych
P.O. Box 160
Shaw Island, WA 98286

Tanya Barnett
Brown, Reaves & Manning PLLC
606 Columbia St. NW, Suite 212
Olympia, WA 98501

Sharon Sullivan Eckholm
Assistant Attorney General
Licensing and Admin Law Division
P.O. Box 40110
Olympia, WA 98504

DATED this _____ day of August 2004.

HEIDI MAIN