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**BEFORE THE WESTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD**

FRIENDS OF THE SAN JUANS, ) No. 03-2-0003-c  
LYNN BAHRYCH and JOE SYMONS, ) SAN JUAN COUNTY’S  
) ANSWER TO REQUESTS FOR  
Petitioners, ) RECONSIDERATION /  
) CLARIFICATION  
v. )  
)  
SAN JUAN COUNTY, )  
Respondent. )

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**Summary**

San Juan County requests that the Growth Board deny the motions and requests for “reconsideration or clarification” made by Friends of the San Juans, Lynn Bahrych, Maile Johnson and Joe Symons (collectively “Friends”). Though stated as a request “to clarify or reconsider its Order of June 30, 2004,” in fact, the requests are for reconsideration of a final order made by the Western Washington Growth Management Hearings Board nearly three and one-half years ago. That order was never appealed and is binding on the County and this Growth Board.

The Friends do not identify any part of the June 30, 2004 Order it contends is wrong or incorrect. The Friends do not mention the ground for reconsideration and do not list any law, rule or case that supports their position. Finally, the Friends make reference to altered documents, documents that have blatant omissions, facts that are unproven, all of which are outside of the record in this matter, and submitted without the prior authorization

1 of this Board, as required by WAC 242-02-810.

2 All of the arguments and issues raised by the Friends have been previously argued  
3 and decided by this Board in response to a Petition for Declaratory Ruling made by the  
4 County over three and one-half years ago. The Growth Board is bound by the April 6, 2001  
5 Order, just as the County is bound by that Order.

### 6 **FACTS**

7 Over three and one half years ago, San Juan County filed a Petition for Declaratory  
8 Ruling in which the County asked this Growth Board to clarify whether the Order of  
9 Invalidity as to Guest Houses dated November 30, 2000 “prohibits the construction of a  
10 main house when the property owners have previously constructed a guest house on the  
11 property.” (Exhibit A, para. 4.1.) The Petition was supported by detailed examples and  
12 facts in which a guest house was constructed before the completion of a main house.  
13 (Exhibit A, Attachments B-F)

14 On January 24, 2001, the Presiding Officer of the Growth Board, Hon. William  
15 Nielsen, issued an order in which a schedule was established for briefing on the issue; a  
16 directive was sent out to notify “other affected property owners” and property owners were  
17 invited to intervene, but only for the purpose of submitting written argument. (Exhibit B)

18 On February 21, 2001, the Presiding Officer issued an Order Granting Intervention  
19 to about twenty people. At that time, the Presiding Officer identified the issue as follows:

20 The issue to be addressed by Intervenors is strictly limited to  
21 the request by San Juan County dated January 16, 2001, for  
22 clarification of: Whether the determination of invalidity of  
23 allowance of new guesthouse construction in rural and  
24 resource lands prohibits the issuance of a building permit for  
25 the construction of a principal residence if the property  
26 owners have previously constructed a guest house on the  
27 property.

24 (Exhibit C)

26 On February 14, 2001, Friends of the San Juans, Lynn Bahyrch, Maile Johnson and  
27 Joe Symons submitted a response to San Juan County’s Petition for Declaratory Ruling. In  
28 that submission, the Friends asked that the Growth Board engage in a particularized

1 analysis of the situation of each intervenor and determine whether the County Permit  
2 Center “sanctioned their overall construction plan” for a guest house and then the  
3 construction of a main house. (Exhibit D, p. 7) The challengers said that they “would  
4 strenuously object to a general policy of permitting a second residence for every property  
5 owner who has constructed a guest house first, even if the permit states it is a guest house.”  
6 (Exhibit D, p. 7) As relief to the declaratory judgment, the Friends requested that the  
7 Board not allow the construction of the main house; or if it is allowed, to carefully restrict  
8 the authority to those who were issued a “Guest House Permit” or submitted an “approved  
9 overall site plan.” (Exhibit D, p. 8)

10 On April 6, 2001, the Growth Board ruled in favor of the County and against the  
11 Friends. The Board’s ruling declined to adopt the property - specific approach requested  
12 by the Friends. The Growth Board issued an order that outlined the procedural history, and  
13 then set forth its ruling in the following two paragraphs.

14 The gravamen of the November 30, 2000 order concerning  
15 this issue was the lack of adequate analysis by the County as  
16 to the impact of allowing an additional “guest house” for  
17 every single family residence allowed in San Juan County.  
18 As succinctly set forth in RCW 36.70A.302(2) a  
19 determination of invalidity is prospective only and does not  
20 affect any vested permits. In the November 30, 2000, order it  
21 was our intention to prohibit vesting of a second “guest  
22 house” on a lot until the County completed a proper analysis  
23 of allowing such a blanket density. It was never our  
24 intention to prohibit a single-family residence from being  
25 built when an existing guest house that meets the guest house  
26 definition contained in SCC 18.40.240 was already permitted  
27 or already built.

28 Therefore we answer the County’s question of whether the  
determination of invalidity “also prohibits the issuance of a  
building permit for the construction of a principle residence  
if the property owner have previously constructed a guest  
house on the property” in the negative. However, the  
previously constructed or permit vested “guest house” must  
meet the definition of SCC 18.40.240. Otherwise the second  
residence would fall within the determination of invalidity  
issued on November 30, 2000.

This is a Final Order under RCW 37.70A.300(5) for purposes  
of appeal.

(Exhibit E, pp. 2-3)

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No appeal was taken of the April 6, 2001 Order. This Order is now a Final Order and is binding on the County and the Growth Board.

Five days later, on April 12, 2001, the San Juan County Prosecutor issued a News Release entitled “Growth Board Clarifies Guest House Moratorium.” (Exhibit F) In keeping with the policy of the Prosecutor’s Office, the News Release was posted to the website of the Prosecuting Attorney, when it has been available to be viewed and relied upon by others. This news release correctly notified the public of “the ban on new guest house construction does not prevent property owners who have already built a guest house or have obtained a vested permit to build a guest house from proceeding with the construction of the main residence.” *Id.*

Four months later, on August 6, 2001, Deputy Prosecuting Attorney Alan Marriner submitted a Memorandum to Mr. Grant Beck, Permit Center Director. (Redfern Dec. Ex. A) In that Memorandum, Mr. Marriner examined various factual patterns in which the Order of the Growth Board may apply. Before responding, Mr. Marriner carefully reviewed the decision of the Growth Board dated April 6, 2001 and the definition of “guest house” in the County Code. Based upon the text of the Order, Mr. Marriner concluded that a structure could qualify as a “previously constructed” guest house if it meets the performance standards of SJCC 18.40.240, without proof of intent that the existing structure was used as a guest house. Mr. Marriner advised that in reviewing building permit applications for a main house, the Permit Center should also examine the existing structure to assure it meets all of the requirements of accessory dwellings in SJCC 18.40.240, to wit:

- A. Only one guest house per single-family residence;
- B. The guest house cannot exceed 1000 square feet;
- C. The guest house must be served by the same driveway as the principal residence unless site conditions warrant a separate access;

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- D. A guest house must be served by the same water supply and sewage disposal system as the principal residence unless otherwise approved by the County sanitarian;
- E. At least one additional off street parking space must be provided for the guest house in addition to the parking requirements for the principal residence;
- F. A guest house must be owned by the owner of the single-family residence.

(Redfern Dec. Ex. A. pp. 2-3)

Three years later, on June 30, 2004, Maile Johnson, a board member of the Friends of the San Juans, sent to the Growth Board a four-page letter unsupported by a declaration. Prior to submitting the letter, Ms. Johnson made no request to submit additional materials to the Growth Board, as required by WAC 842-02-810. In the letter, Ms. Johnson complains that a neighbor is clearing land, and she has been told he plans to build a main house on property which has a small existing structure that would qualify as a guest house. As relief, Ms. Johnson writes "I request that this Board require that San Juan County act in accordance with this Board's Orders." No specific relief is mentioned and no authority is given for the request.

Attached to Maile Johnson's letter are portions of an e-mail exchange between Ms. Johnson and Jane Redfern, a Permit Coordinator with the San Juan County Community Development and Planning Department. The document submitted by Maile Johnson omits the identification of the parcel number of the specific property at issue and the following paragraph which shows that the existing building on the property existed since at least the year 2000. A complete copy of the e-mail is attached as Exhibit B to the Declaration of Jane Redfern. The omitted information is shown in bold type below:

**Dear Jane,**

**I guess you've answered my question as to this particular property, but I have another closely related question, which is: does the quoted prosecutor's rule apply ONLY if the existing house was built prior to the moratorium?**

1           **Many thanks for you [sic] prompt and helpful replies, Jane!**

2           **Sincerely,**

3           **Maile**

4  
5           **RE: AP# 26142240001**

6           **Dear Maile,**

7           **The Owner/Builder permit you spoke of (BO422) was issued on August**  
8           **15, 2000, way before the moratorium of guesthouses (November 30,**  
9           **2000). On the building permit card, the project description was**  
10           **“Alteration.”**

11           The omission is material because it demonstrates that Maile Johnson was inquiring  
12 about a very specific parcel and not a general policy of the County.

13           Also, on June 30, 2004, Board Members Holly Gadbow and Nan Hendrickson  
14 issued an Order Finding Continued Non Compliance and Invalidity in Case No. 03-2-  
15 0003c. The Order states:

16                     The County shall within 60 days of this order take some type  
17                     of published official action that assures the public and this  
18                     Board that the County is complying with and will continue to  
19                     comply with this Board’s order in this case as modified by  
20                     the Thurston County Superior Court decision of January 9,  
21                     2004 and file it with the Board.

22           The Board also set out a compliance schedule requiring some action by August 30,  
23 2004, and a compliance hearing on February 2, 2005.

24           On July 2, 2004, Randall K. Gaylord, Prosecuting Attorney for San Juan County  
25 submitted a response regarding the letter of Maile Johnson to the Growth Board.

26           On July 12, 2004, Friends, Lynn Bahrych and Joe Symons served a motion asking  
27 that the Board “clarify or reconsider its order of June 30, 2004.” To grant the relief  
28 requested would require that the Growth Board modify its Final Order dated April 6, 2001,  
which allows the construction of a main house after a guest house has been built. In the  
alternative, the Friends ask that the County be required specifically to amend its ordinance

1 within 60 days of June 30, 2004. No legal argument, no supporting memorandum, and no  
2 facts are submitted to the Board, except for the letter of Maile Johnson and another version  
3 of the e-mail correspondence between Jane Redfern and Maile Johnson.

4 While the e-mail submission of Maile Johnson was remarkable because of its  
5 omissions, the e-mail submission by the Friends is even more remarkable because it altered  
6 the Redfern e-mail by inserting additional language at the top of the e-mail in the same  
7 type style, font, and size as the rest of the e-mail and thereby giving the impression  
8 (falsely) that the e-mail is an official “policy statement” of the County. The material  
9 inserted by the Friends is shown in bold as:

10 **(E-mail to Maile Johnson from San Juan County permit center)**

11 **San Juan County Policy Statement**

12 In fact, San Juan County does not make “policy statements” in e-mails from permit  
13 coordinators and citizens. (Dec. of Jane Redfern (para. 7)) Policy Statements on legal  
14 issues are made by the Board of County Commissioners, not in e-mail. *Id.*

15 Petitioner Joe Symons filed a “Memorandum” which was received by the  
16 Prosecuting Attorney on July 14, 2004. Joe Symons speaks in the harshest tones, makes  
17 wild accusations that the County is not acting in good faith and that the Memorandum  
18 dated August 6, 2001 from Alan Marriner to Grant Beck “appears disdainful, disrespectful  
19 and deceitful” in its disregard for the Growth Board’s intent. Mr. Symons observations are  
20 not based upon a reading of the memorandum. The only quotations are from the  
21 incomplete paraphrasing of the Memorandum, and the partial e-mail that Maile Johnson  
22 provided to the Growth Board.

23 **ISSUES PRESENTED**

- 24 1. Are there grounds for the Growth Board to reconsider its Order Finding  
25 Continued Noncompliance and Invalidity regarding the County regulations  
of Detached Accessory Dwelling Units dated June 30, 2004?
- 26 2. Should the Growth Board direct San Juan County to immediately  
27 discontinue its policy of permitting the construction of a main house where a  
detached guest house has already been constructed that meets all the  
28 standards for a detached guest house found in the county code?

1 3. Should the Growth Board direct San Juan County to amend its Ordinances  
2 by August 30, 2004 to bring them into compliance with the Growth Board's  
Orders?

3 **ARGUMENT**

4 **1. No Grounds have been given for reconsideration as required by WAC  
5 242-02-832.**

6 There are three grounds by which the Board may reconsider its decisions. None of  
7 the written materials submitted by the Friends have stated the grounds for reconsideration.  
8 None of the grounds are satisfied in this case.

9 WAC 242-02-832 states:

- 10 (2) A motion for reconsideration shall be based on at  
11 least one of the following grounds:  
12 (a) Errors of procedure or misinterpretation of  
13 fact or law, material to the party seeking  
reconsideration;  
14 (b) Irregularity in the hearing before the board by  
15 which such party was prevented from having a  
16 fair hearing; or  
17 (c) Clerical mistakes in the final decision and order.

18 No errors of procedure or misinterpretation of law is identified. No irregularity in  
19 the hearing is asserted. No clerical mistakes are claimed. No affidavit or declaration (the  
20 normal manner in which facts are presented) are provided to the Growth Board.

21 **A. The Partial and Altered E-mail of Jane Redfern and the Maile Johnson  
22 Letter are Not Grounds for Reconsideration.**

23 The only possible grounds for reconsideration is to review the incomplete or altered  
24 e-mail of Jane Redfern or to consider Maile Johnson's letter regarding the clearing of land  
25 near her property. These are the only two documents attached to the Motion made by the  
26 Friends.

27 Neither altered e-mail of Jane Redfern or the Maile Johnson letter was part of the  
28 record below and no motion was made for the Growth Board to consider this additional  
"evidence." The rules of the Growth Board only allow the Board to review the record  
developed by the County and such additional evidence that may be presented upon motion  
of the party. The prehearing procedure of WAC 242-02-540 states:

1 Generally, a board will review only the record developed by  
2 the ... county ... in taking the action that is the subject of  
3 review by the board. A party by motion may request that  
4 board allow such additional evidence as would be necessary  
5 or of substantial assistance to the board in reaching its  
6 decisions and shall state its reasons. A board may order, at  
7 any time, that new or supplement evidence be provided.

8 The same rule applies after the hearing and decision. WAC 242-02-810 states:

9 Unless requested by or authorized by a board, no post  
10 hearing evidence, documents, briefs, or motions will be  
11 accepted.

12 Even if the Board allows the submission of the letter of Maile Johnson and the  
13 partial e-mail of Jane Redfern, there is no “misinterpretation of fact” by the Growth Board.  
14 The Friends are simply trying to insert a new matter into these proceedings, a matter in  
15 which they lost soundly three and one-half years ago. This is not grounds of a “motion for  
16 reconsideration.”

17 **B. The Board Should Not Reconsider the April 6, 2001 Order in this Case**

18 The topic of the Redfern e-mail is whether the November 30, 2000 Order of  
19 Invalidation applies to the construction of a residence where a structure that qualifies as a  
20 guest house has already been built. This topic was presented to the Growth Board in 2001  
21 in the form of a request by the County for a Declaratory Ruling. After allowing the  
22 intervention of 30 or more parties, the Growth Board issued an order that an Order dated  
23 April 6, 2001 in which it concluded that invalidity does not extend to the construction of a  
24 main house where the guest house has already been built. It is this order which is the  
25 basis of the Prosecutor’s Memorandum of August 6, 2001, as referred to in the e-mail of  
26 Jane Redfern.

27 The Growth Board is bound by the April 6, 2001 Order, just the same as the County  
28 is bound by the Order. It is now a final order, an order from which no appeal was filed.  
The April 6, 2001 Order is integral to this case. It refers to the November 30, 2001 Order  
of Invalidation, the original order of invalidity concerning the construction of a guest house.  
The April 6, 2001 Order has never been appealed, and the Invalidation Order was never lifted.

1           There would be a substantial injustice if the Growth Board revisited the April 6,  
2 2001 Order. It is likely that citizens have deferred construction plans in reliance upon the  
3 Growth Board April 6, 2001 Order and so to alter that order now, without notice, would be  
4 a hardship. Moreover, fundamental notions of fairness would require notice to all of the  
5 parties into the April 6, 2001 Order, not just the few people now a party to this matter.

6           There are at least three legal doctrines that make the April 6, Order binding on the  
7 County. The first to the principal of finality. As a general principle, the law promotes  
8 finality of land use decisions. Under the principle of finality, a land use decision is final  
9 when the time for appeal has expired. In *Samuels Furniture v. Dept. of Ecology* the court  
10 said,

11           A "final decision" is "[o]ne which leaves nothing open to  
12 further dispute and which sets at rest cause of action between  
13 parties." BLACK'S LAW DICTIONARY 567 (5th ed.1979).  
14 See also [Reif v. LaFollette, 19 Wash.2d 366, 370, 142 P.2d](#)  
15 [1015 \(1943\)](#) ('A final judgment is such a judgment as at once  
16 puts an end to the action by declaring that the plaintiff has or  
17 has not entitled himself to recover the remedy for which he  
18 sues' ") (quoting 1 HENRY CAMPBELL BLACK, THE  
19 LAW OF JUDGMENTS § 21 (2d ed.1902)). "A judgment is  
20 considered final on appeal if it concludes the action by  
21 resolving the plaintiff's entitlement to the requested relief."  
22 [Purse Seine Vessel Owners v. State, 92 Wash.App. 381, 387,](#)  
23 [966 P.2d 928 \(1998\).](#)

24 147 Wn.2d 440, 19 P.3d 474 (2002)

25           The second principal is the "law of the case" doctrine. Under that doctrine, a court  
26 is required to adhere to decisions declaring the applicable law in previous appeals of the  
27 same case. [Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 \(1988\).](#)

28           Third, under the principle of *res judicata* and *collateral estoppel* a matter already decided  
between parties is binding. *Hilltop Homeowners v. Island County*, 126 Wn.2d, 891 P.2d 29  
(1998). That case explained the doctrine and its purpose as follows:

          " 'Res judicata' refers to the various ways in which a  
judgment in one action will have a binding effect in another."  
Fleming James, Jr. & Geoffrey C. Hazard, Jr., *Civil*  
*Procedure* § 11.3, at 590 (3d ed. 1985). As another  
commentator puts it, "The law of res judicata ... consists  
entirely of an elaboration of the obvious principle that a  
controversy should be resolved once, not more than once." 4

1 Kenneth C. Davis, *Administrative Law Treatise* § 21:9, at 78  
2 (2d ed. 1983). The various policies animating the doctrine  
3 have been aptly summarized and provide a helpful context:  
4 The most purely public purpose served by res judicata lies in  
5 preserving the acceptability of judicial dispute resolution  
6 against the corrosive disrespect that would follow if the same  
7 matter were twice litigated to inconsistent results....  
8 A second largely public purpose has been found in  
9 preserving courts against the burdens of repetitious  
10 litigation....  
11 The judicial interest in avoiding the public burdens of  
12 repetitious litigation is allied with the interest of former  
13 litigants in avoiding the parallel private burdens. For the  
14 most part, attention is focused on the need to protect a  
15 victorious party against oppression by a wealthy ...  
16 adversary....  
17 The deepest interests underlying the conclusive effect of  
18 prior adjudication draw from the purpose to provide a means  
19 of finally ending private disputes. The central role of  
20 adversary litigation in our society is to provide binding  
21 answers. We want to free people from the uncertain prospect  
22 of litigation, with all its costs to emotional peace and the  
23 ordering of future affairs. Repose is the most important  
24 product of res judicata. (Footnotes omitted.) 18 Charles A.  
25 Wright, et al., *Federal Practice and Procedure* § 4403, at 12-  
26 15 (1981). These policies are equally applicable in a quasi-  
27 judicial administrative context. See *Lejeune v. Clallam Cy.*,  
28 *supra*; *Restatement (Second) of Judgments* § 83(1) (1982)  
(valid and final adjudicative determination by administrative  
tribunal has same effects under rules of res judicata as  
judgment of court). From these principles we conclude that  
res judicata is applicable to the present administrative  
context, and stands for the general proposition that there  
must be some limit to repeated submissions of applications  
involving the same subject matter.

19 *Hilltop*, 126 Wn.2d 22, 891 P.2d 29 (1995).

20 The Friends provide no grounds for disregarding the finality of the April 6, 2004  
21 Order, as none exists. Accordingly, the Growth Board must adhere to the April 6, 2001  
22 Order.

23 **D. The Growth Board Is Not Authorized to Grant the Relief Requested**

24 The Friends ask that the Growth Board “direct that the county discontinue its  
25 policy” regarding the construction of a main house after a guest house has been built.  
26 This request is, in essence, a demand for a finding of invalidity on the procedures used by  
27 the County to implement the June 6, 2001 Growth Board Order. Unlike the superior  
28

1 courts, the Growth Board is not given the power of injunctive relief. Instead, the Growth  
2 Board is only given the power to review comprehensive plans.

3 RCW 36.760A.280 states:

4 A growth management hearings board shall hear and determined only those  
5 petitions alleging either:

6 (a) That a ... county ... is not in compliance with the  
7 requirements of this chapter ... as it relates to plans,  
8 development regulations, or amendments adopted under  
9 RCW 36.70A.040 or chapter 90.58 RCW.

10 A complementary statement of the Board's power is found at RCW 36.70A.300,  
11 which states that a final order shall be based "*exclusively* on whether or not a ... county ...  
12 is in compliance with the requirements of this chapter."

13  
14 In *Heal v. Central Puget Sound Growth Management Hearings Board*, 96 Wn.  
15 App. 522, 979 P.2d 864 (1999), the Court held that RCW 36.70A.280 extends to the review  
16 of critical area policies adopted by resolution of the County commissioners. The Growth  
17 Board "does not have jurisdiction to render a decision on a specific development project."  
18 *Somers v. Snohomish County*, 105 Wn. App. 937, 21 P.3d 1165 (2001). If in connection  
19 with a specific parcel, the Friends or Maile Johnson believe the County is acting in a  
20 manner contrary to law, then the remedy of the Friends is to file an appeal under the Land  
21 Use Petition Act. RCW 36.70C.010 *et seq. Id.*

22 No case has gone so far to extend the authority of the Growth Board to review of  
23 opinions of staff planners expressed in an e-mail. Certainly, the decision in *Heal* cannot be  
24 extended to the e-mail merely because the Friends printed "San Juan County Policy  
25 Statement" across the top of a partial and incomplete e-mail of a permit coordinator.  
26 Matters of legal policy are decided by the Board of County Commissioners, not  
27 memorandums of legal counsel. RCW 36.32.120(6) *Osborn v. Grant County*, 130 Wn.2d  
28 615, 627, 926 P.2d 911 (1996). The "policy" of the San Juan County Board of County

1 Commissioners to adhere to the April 6, 2001 Order of the Growth Board.

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**CONCLUSION**

The Motions of the Friends should be denied.

**RANDALL K. GAYLORD  
PROSECUTING ATTORNEY**

Date: August 10, 2004  
Friday Harbor, Washington

By: \_\_\_\_\_  
Randall K. Gaylord, WSBA #16080  
San Juan County Prosecutor