

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jul 05, 2013, 3:25 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

No. 88405-6

SUPREME COURT
OF THE STATE OF WASHINGTON

TOWN OF WOODWAY and SAVE RICHMOND
BEACH,

Petitioners,

v.

SNOHOMISH COUNTY and BSRE POINT WELLS, LP,

Respondents.

TOWN OF WOODWAY'S SUPPLEMENTAL BRIEF

Wayne D. Tanaka, WSBA #6303
Kristin N. Eick, WSBA #40794
Attorneys for TOWN OF WOODWAY
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

TABLE OF CONTENTS

Page

I. INTRODUCTION1

II. ISSUES FOR REVIEW1

 A. Prior to GMA, did a violation of SEPA result in a void ordinance? [Yes.].....1

 B. Prior to GMA, could vested rights be obtained from a void ordinance? [No.].....1

 C. Does RCW 36.70A.302 create vested rights? [No.].....1

 D. Do RCW 36.70A.302 and RCW 36.70A.300 overrule pre GMA SEPA law? [No.].....1

III. STATEMENT OF CASE.....1

IV. STANDARD OF REVIEW.....4

V. ARGUMENT.....5

 A. The Court of Appeals Misinterpreted RCW 36.70 A.302(2).5

 B. Pre-GMA case law clearly established that an ordinance enacted in violation of SEPA was void.7

 C. Pre-GMA case law clearly establishes that vested rights may not be obtained in a void ordinance.6

 D. Neither RCW 36.70A.300 nor RCW 36.70A.302 overrule pre-GMA law.10

E. Review of the GMA legislative history confirms that the drafters did not address the consequences of noncompliance with SEPA on vested rights.12

F. There is insufficient evidence of an intent to overrule past case law.16

G. The Town did not violate LUPA.18

VI. CONCLUSION19

TABLE OF AUTHORITIES

Page

CASES

Ashenbrenner v. Dep't of Labor and Indus.,
62 Wn.2d 22, 26, 380 P.2d 730 (1963).....16, 17

Bach v. Sarich,
74 Wash.2d 575, 582, 445 P.2d 648 (1968)9

Eastlake Cmty. Council v. Roanoke Assocs.,
82 Wn.2d 475, 513 P.2d 36 (1973).....7

Flannery v. Bishop,
81 Wn.2d 696, 701-02, 504 P.2d 778 (1973)17

Juanita Bay Valley Community Ass'n v. City of Kirkland,
9 Wn. App. 59, 73, 510 P.2d 1140 (1973).....7

Lassila v. Wenatchee,
89 Wn.2d 804, 817, 576 P.2d 54 (1978).....7

Mohr v. Grantham,
172 Wn.2d 844, 262 P. 3d 490 (2011).....5

Noel v. Cole,
98 Wn.2d 375, 378-80, 655 P.2d 245 (1982)7

Responsible Urban Growth Group v. City of Kent ("RUGG"),
123 Wn.2d 376, 868 P.2d 861 (1994).....7, 8, 9, 10

Searles v. Central Puget Sound Growth Management Hearings Board,
159 Wn. App. 148, 244 P.3rd 1003 (2010)11

South Tacoma Way LLC v. State of Washington,
169 Wn.2d 118, 233 P.3d 871 (2010).....7

<i>State v. Greenwood</i> , 120 Wn.2d 585, 593, 845 P.2d 971 (1993).....	16
<i>WCHS v. City of Lynnwood</i> , 120 Wn. App. 668, 86 P.3rd 1169 (2004)	18

STATUTES

50 Am. Jur., Statutes § 340, p. 332.....	17
Chapter 36.70A RCW.....	15
RCW 36.70A.020	11
RCW 36.70A.302(1).....	11
RCW 36.70A.302(2).....	1, 5, 6
RCW 90.61.040(4).....	15

OTHER AUTHORITIES

1994 Governor’s Task Force	12, 13
1998 Final Report of the Land Use Study Commission.....	14, 15
Land Use Petition Act.....	18
Land Use Study Commission’s 1996 Annual Report.....	13, 14
Ordinance 2837.....	8
State Environmental Policy Act, § 3.01.....	6

APPENDIX

1. Governor's Task Force on Regulatory Reform - Final Report
2. Land Use Study Commission, 1996 Report, Executive Summary
3. Land Use Study Commission, Final Report, December 1998

I. INTRODUCTION

This is a case about consequences and accountability. It raises important questions concerning the continued vitality of the State Environmental Policy Act (SEPA). This case also presents important questions about vesting and the proper balance between a property owner's rights and the rights of the public to a healthful environment and to continued assurance that their elected officials comply with the procedural requirements of SEPA prior to enacting new development regulations that could directly affect their community.

II. ISSUES FOR REVIEW

- A. **Prior to GMA, did a violation of SEPA result in a void ordinance? [Yes.]**
- B. **Prior to GMA, could vested rights be obtained from a void ordinance? [No.]**
- C. **Does RCW 36.70A.302(2) create vested rights? [No.]**
- D. **Do RCW 36.70A.302(2) and RCW 36.70A.300 overrule pre GMA SEPA law? [No.]**

III. STATEMENT OF THE CASE¹

The Town of Woodway² is a small city located in the southwest

¹ These background facts are taken from the Central Puget Sound Growth Management Hearing Board, Corrected Final Decision and Order (FDO), CP 92-174 and in particular CP 99-101.

² The Town is a non-charter, optional municipal code city under RCW 35A. Its official name is the Town of Woodway.

WDT1078805.DOCX;2\00074.050009\

corner of Snohomish County, just north of the King County line. Located to the west of the Town lies a 61-acre tract in unincorporated Snohomish County known as Point Wells. It was the site of a former oil storage facility, which is now inactive. The Town almost completely surrounds Point Wells, with Puget Sound bordering on the west. To the south of Woodway and Point Wells is King County and the City of Shoreline. While the past use of the Point Wells site has been industrial, the surrounding neighborhoods, both in Woodway and in Shoreline, are exclusively single family. The only vehicular access to Point Wells is by means of a winding two-lane street traversing the Town for a short distance, and then continuing into Shoreline.

Point Wells lies within the Town's urban growth area according to the Snohomish County Comprehensive Plan. As such, the Town has for several years planned for the possible annexation of Point Wells and, in its Comprehensive Plan, set forth its vision for future redevelopment of the area. The Town envisioned a mixed-use development with a residential component.

However, in response to requests by the current owner, BSRE, the County amended its Comprehensive Plan and zoning code to allow significantly more density, height and intensive uses than contemplated in

the Town's plan. The County's actions designated Point Wells as an "Urban Center", the County's most intensive and dense mixed-use category. The development regulations imposed no maximum density, only a minimum. Also, the development regulations allowed structures to be up to 180 feet in height.

The Town and a local citizens' group, Save Richmond Beach (SRB), challenged the County's amendments to the Comprehensive Plan and development regulations before the Growth Management Hearings Board (Board). After the hearing on the merits but prior to the Board issuing its decision, BSRE filed a short plat and other applications for development of the Point Wells site, taking advantage of the increased densities and uses allowed under the challenged Comprehensive Plan amendments and associated development regulations. The applications were for approximately 3000 dwelling units and 100,000 square feet of commercial/retail uses.

The Board eventually concluded that the County had violated SEPA with respect to both the comprehensive plan amendments and development regulations. The Board also found that the County's comprehensive plan designation for Point Wells was noncompliant with the GMA. Furthermore, the Board found that continued validity of the

comprehensive plan impaired certain goals of the GMA and thus entered an order of invalidity. However, with respect to the development regulations, the Board found that the petitioners had failed to carry their burden of proof to show noncompliance with the GMA, but the Board remanded the ordinances to the County for compliance with SEPA.³ None of the parties appealed the Board's decision.

In compliance with the Board's FDO, the County began to redo its environmental analysis and to reconsider changes to the comprehensive plan and development regulations.⁴ Meanwhile, however, the County and BSRE proceeded with the administrative processing of BSRE's permits, apparently on the belief that BSRE's applications had vested to the now void comprehensive plan and development regulations.

On September 12, 2011, the Town filed an action in superior court seeking a declaration that BSRE's applications were not vested and for an injunction. On cross motions for summary judgment, the superior court found in favor of the Town and entered judgment accordingly. On appeal, the Court of Appeals reversed.

IV. STANDARD OF REVIEW

³ FDO, CP 166-167.

⁴ RCW 36.70A.130 requires the County to continuing review of development regulations to assure consistency with the comprehensive plan.

WDT1078805.DOCX;2\00074.050009\

The trial court decided this case on summary judgment. Therefore, review by the Supreme Court is *de novo*. *Mohr v. Grantham*, 172 Wn.2d 844, 262 P. 3d 490 (2011). There are no contested facts and, thus, the matter can be decided as a question of law.

V. ARGUMENT

A. The Court of Appeals Misinterpreted RCW 36.70A.302(2).

The fundamental legal issue in this case is the proper interpretation of RCW 36.70A.302(2). The Court of Appeals held this statute provides that development permit applications filed prior to the Growth Board's decision vest to the development regulations in effect at the time of filing, regardless of whether SEPA noncompliance is subsequently determined by the Board. A plain reading of the statute shows that this interpretation is clearly in error. The statute states:

A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local rules before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

Notably, this statute speaks in the past tense. A determination of

invalidity does not extinguish rights “that vested...before receipt of the board’s order....” Plainly, RCW 36.70A.302(2) merely preserves rights that were already vested “under state or local rules” and does not create vested rights. It is therefore necessary to determine whether rights are vested by examination of those state or local rules. While state law and local ordinances establish that the completed applications filed in this case would ordinarily result in vested rights, the issue in this case is whether the County’s failure to comply with SEPA affects the ability of the developer to acquire vested rights.

B. Pre-GMA case law clearly established that an ordinance enacted in violation of SEPA was void.

SEPA was enacted by vote of the people in 1971. RCW 43.21C.020 provides: “The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.” “The Act’s primary means of promoting its policies are ‘action-forcing’ procedural requirements designed to assure the integration of environmental values and consequences in the decision-making of all agencies of state and local government.” Settle, *State Environmental Policy Act*, § 3.01.

Government actions taken in violation of SEPA’s procedural
WDT1078805.DOCX;2\00074.050009\

requirements are void *ab initio* and *ultra vires*. See, e.g., *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973) (“invalidating” a grading permit issued in violation of SEPA); *Lassila v. Wenatchee*, 89 Wn.2d 804, 817, 576 P.2d 54 (1978) (invalidating and “vacating” a comprehensive plan amendment where there was insufficient showing of compliance with SEPA); *Noel v. Cole*, 98 Wn.2d 375, 378-80, 655 P.2d 245 (1982); *South Tacoma Way LLC v. State of Washington*, 169 Wn.2d 118, 233 P.3d 871 (2010).

C. **Pre-GMA case law clearly establishes that vested rights may not be obtained in a void ordinance.**

Prior to the GMA, the law was well-established that a void ordinance did not create vested rights. That vested rights may not be obtained to an invalid permit or regulation was addressed in both *Eastlake Cmty. Council v. Roanoke Assocs.*, 82 Wn.2d 475, 513 P.2d 36 (1973) and *Responsible Urban Growth Group v. City of Kent* (“RUGG”), 123 Wn.2d 376, 868 P.2d 861 (1994).

The *Eastlake* case is the earliest instance where the Court determined that SEPA’s requirements were not trumped by an issued permit. As the court stated: “To permit such a contention would invite circumvention of SEPA by those quick to advance their projects to completion.” *Eastlake*, 82 Wn.2d at 497.

In *RUGG*, the Court found that vested rights may not be obtained in a void regulation. There, a citizen's group challenged the City Council's adoption of a rezone ordinance, claiming that the City failed to give proper notice of the rezone and that the Council violated the appearance of fairness statute by failing to disclose ex parte meetings between the councilmembers and the developer. *RUGG*, 123 Wn.2d at 381. The developer contemporaneously attempted to obtain a building permit pursuant to the challenged ordinance, but was met with stiff opposition from *RUGG*. "Three years after its initial application and approximately 2 months before trial, SDM [the developer] was granted the building permit and began foundation work on the . . . property." *Id.* (emphasis added). The trial court ultimately agreed with the citizen's group, holding that the rezone ordinance was enacted without proper notice and in violation of the appearance of fairness doctrine. *Id.* Consequently, the trial court held as follows:

All actions taken pursuant to Ordinance 2837, including any permits issued in reliance thereon, are also hereby declared invalid and *void*, as of the date of their issuance or inception,....

Id. (emphasis added).

Of primary importance to the present case, the trial court also

WDT1078805.DOCX;200074.050009\

denied the developer's motion for reconsideration, which included an argument "that the building permit could not be voided for equitable reasons because the developer had started construction and, therefore, had vested rights." *Id.* at 382.

The Supreme Court affirmed the trial court's decision, holding that the rezone ordinance was invalid because it was adopted without satisfying statutory or due process notice requirements. *Id.* at 389. In addressing the developer's argument that it was entitled to a balancing of the equities because it had already begun construction and, therefore, had vested rights in the project, the Supreme Court stated:

First, [the developer] argues that it was entitled to a balancing of the equities because it had already begun construction and, therefore, had vested rights in the project. As the trial court held, however, the balancing of the equities doctrine is reserved for the innocent developer who proceeds without any knowledge of problems associated with the construction. *Bach v. Sarich*, 74 Wash.2d 575, 582, 445 P.2d 648 (1968). In this case, SDM had full knowledge that the validity of ordinance 2837 and the building permit were hotly contested and that trial was approaching. RUGG had already requested injunctive relief in its petition and, therefore, SDM was apprised of the possibility that any development made pursuant to ordinance 2837 would be enjoined and proceeded with

construction at its own risk. We hold that the trial court properly granted the permanent injunction and did not err by failing to balance the equities.

Id. at 389-90 (emphasis added).

Thus, the *RUGG* Court affirmed that vested rights may not be wielded as a sword by a developer to effectively validate and render unreviewable an otherwise illegal ordinance. The Court declined to recognize vested rights where the developer knowingly assumed the risk that the ordinance was improperly enacted, which is precisely the factual situation presented in the instant matter where BSRE filed its development applications shortly after the hearing before the Growth Board but prior to the issuance of its Final Decision and Order.

D. Neither RCW 36.70A.300 nor RCW 36.70A.302 overrule pre-GMA law.

Having established pre-GMA law with respect to vesting to a void ordinance, the question becomes whether the GMA changed the rules. As indicated above, RCW 36.70A.302 which deals directly with vesting and invalidity, does not create a vested right, but only protects rights that had already vested under other law. Nothing in RCW 36.70A.302 can be read as changing the vesting rules as existed prior to the GMA. The only other

relevant GMA statute is RCW 36.70A.300(4).⁵

It should first be noted that RCW 36.70A.300(4) does not mention vesting or vested rights. It states that unless the Board makes a finding of invalidity under RCW 36.70A.302(1), a finding of noncompliance shall not “affect the validity of comprehensive plans and development regulations during the period of remand.” In this case, the Board did not make a finding of noncompliance as to the GMA with respect to the development regulations.

Comprehensive plans and development regulations are “invalid” if the Board determines that the plans and regulations are not in compliance with the GMA and continued validity would interfere with one or more of the GMA goals set forth in RCW 36.70A.020.⁶ Thus, violation of SEPA does not automatically mean the comprehensive plan or development regulation is invalid. The Board must also find interference with one or more of the GMA goals. *Davidson Searles v. Central Puget Sound Growth Management Hearings Board*, 159 Wn. App. 148, 244 P.3d 1003 (2010). Clearly then, validity and invalidity are terms of art and refer only to violations of the GMA. As noted above, the pre-GMA law held that

⁵The Court of Appeals did not rely on this statute in reaching its decision.

⁶ RCW 36.70A.302(1). The Board made such a finding with respect to the comprehensive plan.

WDT1078805.DOCX;2\00074.050009\

ordinances enacted in violation of SEPA were *void*. Nothing in the GMA addresses the issue of a comprehensive plan or development regulation that is void because it was enacted in violation of SEPA. A review of the legislative history of the GMA confirms this result.

E. **Review of the GMA legislative history confirms that the drafters did not address the consequences of noncompliance with SEPA on vested rights.**

In an apparent effort to show that the legislature intended to change the law with respect to SEPA, the Court of Appeals quoted extensively from the legislative history of the GMA. However, contrary to the Court of Appeals' view, the legislative history of the GMA amendments regarding the effect of a determination of invalidity on vested rights reveals that the task forces and commissions studying the subject did not contemplate the effect of noncompliance with SEPA on vested rights.

The 1994 Governor's Task Force on Regulatory Reform was "charged with finding ways of simplifying the state's increasingly complex and sometimes *overlapping*" land use rules and regulations. *Washington Office of Fin. Mgmt., Government's Task Force on Regulatory Reform: Final Report* at 1 (Dec. 20, 1994). (Appendix 1). In the Section discussing Appeals and Litigation, the Task Force identified

that the adoption of the GMA had “created a new legal issue” it believed needed to be resolved. *Task Force* at 52. Namely, the Task Force stated:

Under the GMA, a local government’s development regulations must be consistent with its comprehensive plan. If a comprehensive plan is declared invalid, *or if a development regulation is found to be inconsistent with the plan*, the validity of any permits issued by the local government under the authority of those development regulations will be called into question.

Id. (emphasis added). Notably, in describing the “new legal issue”, the Task Force only recognized that the validity of permits issued under development regulations could be called into question where the development regulation was ultimately found to be inconsistent with the comprehensive plan, which is a GMA violation. The Task Force did not discuss the possibility that a development regulation could also be enacted in violation of SEPA, while still remaining compliant with the GMA. Thus, the recommendation that a comprehensive plan or development regulation found to be invalid “should remain in effect, unless the Growth Management Hearings Board determines that continued enforcement of the plan would violate the policy of the GMA” did not touch upon the effect of a SEPA violation only. *Id.* The issue was framed in terms of GMA noncompliance.

The Land Use Study Commission’s 1996 Annual Report again
WDT1078805.DOCX;2\00074.050009\

studied the effect of invalidity on vesting. *Washington Land Use Study Comm'n*, 1996 Annual Report and Executive Summary (Jan. 29, 1997) (Appendix 2). The Commission report stated: "Under the legislation, vesting is not affected by a finding that a plan or regulation *does not comply with the GMA*. Vesting is only affected by a determination of validity."⁷ The Commission's recommendation likewise framed the issue solely with respect to GMA. Thus, the Commission stated: "Since their creation, the Boards have had the authority to determine that plans or regulations *do not comply with the GMA*. This authority led to concerns about the effect of a decision of non-compliance on permit applications and projects that are dependent upon those plans or regulations...The exercise of this authority has proved to be a potent tool for encouraging compliance with the GMA."⁸ Thus, again, noncompliance with the GMA - and not SEPA - was the Commission's only consideration.

The 1998 Final Report of the Land Use Study Commission also addressed the issue of vesting. The Commission was asked to consider: "whether vesting during a period of time a comprehensive plan is on appeal results in the approval of projects that are *inconsistent with a*

⁷ Annual Report, Section V(E) at 14.

⁸ 1996 Annual Report, Recommendation B(2) at 20 (emphasis added).

WDT1078805.DOCX;2\00074.050009\

comprehensive plan that is found in compliance with the GMA.”⁹ This mandate of study was established in RCW 90.61.040(4), which stated: “The commission shall analyze the impact of such approvals *on ensuring the attainment of the goals and policies of chapter 36.70A RCW...*”¹⁰ The Commission’s study was therefore “intended to determine to what extent vesting to those plans and development regulations that did not comply with the GMA interfered with meeting the GMA’s goals and policies.”¹¹ Clearly the concern was related to vesting to development regulations that were inconsistent with the comprehensive plan eventually held to be compliant and whether the goals of the GMA were being fulfilled, not on whether environmental impacts were properly considered when adopting those development regulations.

SEPA was not mentioned at all in any of the sections of the legislative reports analyzing the effect of invalidity on vested rights, and these sections formed the basis for the enactment of and amendments to RCW 36.70A.302 and RCW 36.70A.300 between 1995 and 1998. Importantly, the Task Force and the Commission’s discussion focused solely on the consequences for issued permits if the Board subsequently

⁹ Washington Land Use Study Comm’n, Final Report, Ch. 14 (Dec. 1998) at 8 (Appendix 3).

¹⁰ 1998 Annual Report at 84.

¹¹ 1998 Annual Report at 20.

WDT1078805.DOCX;2\00074.050009\

found the development regulations upon which they relied to be in violation with the GMA - not SEPA. Thus, the Court of Appeals incorrectly cited the legislative history as evidence that the GMA and, specifically RCW 36.70A.302, definitively answers the question about what happens to permit applications filed prior to the time the city or county receives the Growth Board's decision if it finds SEPA noncompliance.

F. There is insufficient evidence of an intent to overrule past case law.

The County's argument that the GMA changed the rules regarding SEPA and vesting runs afoul of the principle that "courts do not favor the repeal of settled principles of law by mere implication," and that the intent to overturn settled principles of law will "not be presumed unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication." *State v. Greenwood*, 120 Wn.2d 585, 593, 845 P.2d 971 (1993). To the contrary, "the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed, unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction." *Ashenbrenner v. Dep't of Labor and Indus.*, 62 Wn.2d 22, 26, 380 P.2d 730 (1963) (citing WDT1078805.DOCX;2\00074.050009\

50 Am. Jur., Statutes § 340, p. 332) (emphasis added).

For example, in *Ashenbrenner*, a worker injured in 1955, when the statutory disability payment was \$100 a month, appealed a decision by the Board of Industrial Insurance Appeals not to increase her payment to \$155 a month, which was the statutory disability payment in effect when she reopened her case to be declared permanently and totally disabled in 1957. The worker argued that because the 1957 statute inserted language stating that payments would be made “when the supervisor of industrial insurance shall determine that permanent total disability results from the injury,” she should be paid the 1957 rate. *Id.* at 24-25. However, relying upon the principles described above--that the courts will not repeal settled principles of law by mere implication--the Court rejected the worker’s interpretation of the statute and found that the 1957 amendments were not intended to overturn long-established principles that rights under the Workers Compensation Act are determined by the law in effect on the date of injury. *See also Flannery v. Bishop*, 81 Wn.2d 696, 701-02, 504 P.2d 778 (1973) (holding that, according to the principle that courts will not repeal settled principles of law by mere implication, amendment of usury statute to include a six-month statute of limitations did not control common law usury rights of action with a 3-year limitation period).

G. The Town did not violate LUPA.

While the trial court ruled that the Town did not violate the Land Use Petition Act (LUPA), the Court of Appeals did not address this issue. In brief, the argument is that the Town should have filed a LUPA appeal of the County's determination that BSRE's applications were complete. This argument is completely meritless since LUPA only applies to a final determination on an application for a project permit.¹² The decision that the permit applications were complete was but one of countless interim decisions that County staff will make as the permit applications make their way through the County process. Once that process is complete and a final decision is reached on the application, then and only then is one required to file a LUPA action within the 21 day time period as specified.¹³

The case of *WCHS v. City of Lynnwood*, 120 Wn. App. 668, 86 P.3d 1169 (2004) is dispositive. There, WCHS applied for a building permit to remodel medical office space to accommodate an opiate substitution treatment facility. The city took the position that the application was not complete because WCHS had not obtained the required DSHS certification to dispense controlled drugs. The City sent

¹² RCW 36.70C.020(2).

¹³ RCW 36.70C.040.

WDT1078805.DOCX;2\00074,050009\

WCHS two letters indicating the application was incomplete and later argued that these were final decisions triggering LUPA. The trial court and Court of Appeals rejected this argument. The Court of Appeals held that the decision on completeness was “an interim decision made in the process of, but prior to, reaching a final decision on a permit. LUPA does not apply to interlocutory decisions.” *Id.* at 679-80.

VI. CONCLUSION

Neither the express wording of the GMA, nor its legislative history, indicates that the legislature intended to overrule the long history of SEPA jurisprudence holding that SEPA noncompliance results in void action and, consequently, that vested rights may not be obtained in a void ordinance. The clear wording of RCW 36.70A.302 protects vested rights, but does not create them. RCW 36.70A.300(4) was intended to address only noncompliance with respect to the GMA and was never intended to overrule prior case law. Under the Respondents’ reasoning, failure to comply with SEPA would carry no consequences since both the County and developer could continue with the old (void) regulations. If that were the law, why comply with SEPA? In order to protect the viability of SEPA and to preserve the integrity of past case law, the Town asks this Court to overrule the Court of Appeals and grant judgment in favor of the

Town.

RESPECTFULLY SUBMITTED this 5th day of July, 2013.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By 

Wayne D. Tanaka, WSBA #6303
Kristin N. Eick, WSBA #40794
Attorneys for TOWN OF WOODWAY

APPENDIX

1. Governor's Task Force on Regulatory Reform - Final Report
2. Land Use Study Commission, 1996 Report, Executive Summary
3. Land Use Study Commission, Final Report, December 1998

APPENDIX 1

Governor's Task Force on
Regulatory Reform
Final Report

**Washington State
Office of Financial
Management**



**Submitted
December 20, 1994**

**Insurance Building
P.O. Box 43113
Olympia, Washington
98504-3113
(360) 753-1766**

We the members of the Governor's Task Force on Regulatory Reform respectfully submit this report for the full consideration of the Legislature. We are proud of the hard work and long hours that we have volunteered in this effort. We are pleased to present this report which includes important recommendations that will ease the regulatory burden placed on our state's citizens. We also recognize that the goals of regulatory reform will not be achieved overnight. The Task Force considered many ideas, however, time constraints limited our ability to fully consider all of the proposals. Our interim report and the records of the subcommittees are evidence that many such ideas were considered. As part of this report, we recommend that the Legislature also consider issues addressed in the interim report. We are optimistic that the Governor and the Legislature will work together to address these issues and others necessary to achieve true regulatory reform.

Volume I

Task Force Recommendations

I. Introduction

Governor Lowry created the Governor's Task Force on Regulatory Reform in August, 1993, through Executive Order EO 93-06. Charged with finding ways of simplifying the state's increasingly complex and sometimes overlapping rules and regulations, the 21-member task force was guided throughout its study by the views and concerns of hundreds of Washington's citizens.

The panel looked for ways to make state regulations more reasonable and easier to understand. They considered options for better coordinating the regulatory process so that people don't have to retrace their steps for different agencies. And they looked for ways to make the regulatory system more cost-effective.

The result is a set of recommendations that balances a critical need to protect our state's environment and the health and safety of its citizens with respect for the concerns of the businessmen and women who abide by those rules. Ultimately, true regulatory reform will not only provide for the coexistence of vital protections and a robust economy, it also will untangle the web of rules and regulations that carry us there.

Specific objectives the Task Force was asked to address include:

- Linking growth management processes and environmental review requirements in a way that fosters environmental protection, planned growth, and sustained economic development.
- Better coordination of regulatory actions within agencies, between agencies and among various government bodies.
- Improving the permit approval process without undercutting environmental protections.
- Considering changes in the state's Administrative Procedures Act or related statutes to encourage more reasonable, efficient, timely, cost-effective and coordinated rule-making and adjudication.

The Task Force considered many ideas brought by the members of the Task Force, interested groups representing business, consumer groups, and environmental and labor organizations. Many individuals participated actively in the work of the Task Force, attending public meetings and offering suggestions. The Task Force discussed many issues, however time constraints limited addressing all of these proposals. This report summarizes our contribution to this broad issue, but we hope that discussions revolving around improving the regulatory system will continue.

legislative session (ESSB 6339) requires each local government to establish timelines for the issuance of permits as part of its GMA development regulations. The integration of environmental review with land use decisions (as outlined in VI. B.) should reduce the issues and time required for review. In addition, other provisions included in these recommendations, such as coordinating state and local permit processes (VII. A. and VII. B.) and consolidating appeals (VIII. A.), will reduce the delay inherent in the current decision making process.]

D. Mitigation/development agreements.

Local governments should be given explicit authority to enter into a mitigation or development agreement with a project applicant. The agreement must set enforceable standards for a project during its buildout and operation, including required environmental mitigation and the amount and timing of the payment of any impact fees. The agreement shall provide that the applicant will not be subject to changes in development regulations or other applicable regulations. The local government may require the applicant to make satisfactory progress towards completion of the project.

[Discussion: Many jurisdictions enter into specific written agreements with applicants to undertake mitigation, such as transportation mitigation agreements or monitoring agreements. These agreements provide a mutual benefit by both requiring the approved project to undertake specific measures and providing assurance to the approved project that those mitigation measures are fixed for the particular project (and hence not subject to later revisions or changed requirements). The agreement may provide options for revisiting the terms of the agreement under specific circumstances and it may require the applicant to begin construction and make progress towards completion of the project under certain timelines.]

VIII. APPEALS AND LITIGATION

A. Revise judicial review of permit decisions to provide consistent, predictable and timely review procedures

The Task Force recommends the simplification of the superior court process for review of land use decisions. The revisions should provide a uniform appeal period for all types of decisions, designate the starting point for the appeal period, clarify who are the parties and the method for service, and establish the standard for review. Judicial review should allow consolidation of appeals of local and state permits into a single court proceeding.

[Discussion: Simplifying and clarifying the current judicial review system can make substantial improvement in the timing and predictability of permit review. The writ of certiorari (review) statute should be revised or replaced to eliminate confusion and procedural traps. A uniform appeal period should be a central element of this revision. The starting point for the appeal must also be clarified. A uniform standard of review and defining parties who must be served and who may intervene are additional requirements necessary to clarify the current process.]

B. Effect of Plan or Development Regulation Invalidity.

The Task Force recommends that a comprehensive plan or development regulation which is found to be invalid should remain in effect, unless the Growth Management Hearings Board determines that continued enforcement of the plan would violate the policy of the GMA. The Board should make appropriate findings and conclusions to support this determination and should limit the effect of its determination to those portions of the plan or regulation that violate the policy of the GMA.

[Discussion: The adoption of the GMA has created a new legal issue that several members of the local government, development, and environmental community believe must be resolved. Under the GMA, a local government's development regulations must be consistent with its comprehensive plan. If a comprehensive plan is declared invalid, or if a development regulation is found to be inconsistent with the plan, the validity of any permits issued by the local government under the authority of those development regulations will be called into question.

Because there are many different circumstances in which this issue may arise, it is not possible to develop a single principle which would apply in all cases. Therefore, the Task Force is recommending giving the Growth Management Hearings Boards discretion to make the determination on a case-by-case basis. The presumption should be that the plan or regulation will remain in effect unless the Board determines this would violate the policy of the GMA.]

C. Shorelines Hearings Board Procedures.

The Shorelines Hearings Board (SHB) should be required to issue its decision on the appeal of a substantial development permit within 180 days after the appeal is filed with the board. In addition, the stay on development under the Shoreline Management Act should be modified. If a substantial development permit has been approved by the local government and by the SHB, the burden should be on the appellant in an appeal to superior court to demonstrate that the project should not proceed pending an appeal.

[Discussion: Prior to some recent statutory changes, on average it took the SHB over a year to issue a final decision on the appeal of a substantial development permit. Although the SHB has made significant improvements in its process, further improvements are necessary. The SHB should issue its decision within 180 days. This is the same period of time allowed the Growth Management Hearings Boards.

The SMA currently provides a mandatory stay of a substantial development permit pending resolution of all appeals. Current law allows the applicant to request the superior court to lift the stay if the SHB has upheld a local government decision to issue the permit. In these circumstances, the Task Force believes the burden of justifying the stay should be on the person objecting to the permit rather than on the project proponent. The stay in these circumstances should be limited to those cases in which the appellant demonstrates the potential for damage to the environment.]

D. Review of Shoreline Master Programs and Amendments

The Growth Management Hearings Boards should be given authority to review shoreline master programs and amendments for compliance with the GMA. Under VI. E., the

APPENDIX 2

**Land Use Study Commission
1996 Annual Report
Executive Summary**

**RECEIVED
MAY - - 1997
WA STATE LIBRARY**

I. Introduction

The Land Use Study Commission was created by the 1995 Legislature as part of major regulatory reform legislation. The Commission has 14 members representing a cross-section of interests in land use and environmental issues. The Commission's long-term task is to look at the consolidation of state land use and environmental laws.

The Commission's 1996 annual report focuses on the Growth Management Act (GMA) and how it is working. The Commission is recommending amendments to clarify and improve the GMA. These amendments are mid-course corrections. The Commission concluded that the GMA framework, which provides for comprehensive plans, development regulations which implement those plans, and appeal procedures to implement this decision making process, should be maintained.

Since its passage in 1990, over 155 counties and cities have adopted comprehensive plans under the authority of the GMA. Cities and counties do report successes in implementing the GMA, but there have also been problems. To some extent these difficulties are natural because the GMA required changes in the way cities and counties regulated land use. However, there are ambiguities in some key elements of the GMA that the Commission believes should be clarified.

II. General Conclusions

The Commission heard testimony that the GMA has benefited a number counties and cities around the state. But it also heard concerns from counties and cities that there are problems in implementing the statute.

The Commission's recommendations are based on the conclusion that the GMA does need to be clarified in some key areas. Over the last few years, much of the legislative debate about the GMA has focused on procedural aspects of the GMA — for example, what is the appropriate standard to be applied when a county or city decision is appealed. The Commission has concluded that a better approach to these issues is to clarify the ambiguous elements of the GMA that have led to the appeals.

The Commission's report makes the following general conclusions:

- **Create more certainty.** The Commission has concluded that providing greater certainty in the planning process will reduce the need to rely on the Boards for dispute resolution. This will also enable greater deference to decisions made by local authorities that fall within the GMA framework.
- **Provide more flexibility and recognize variable circumstances.** The Commission has concluded that the GMA should be modified to clarify the range of alternatives available to counties and cities for complying with the goals and requirements of the GMA without undermining the purposes of

**WASHINGTON STATE LIBRARY
STATE DEPOSITORY COPY**

the GMA to encourage coordination among governments, provide for efficient delivery of public services, create certainty about the location and nature of development, and protect the state's environment.

- **Create incentives.** The Commission believes there is a need to increase the incentives for building within urban growth areas and reduce the uncertainty about what type of development is appropriate within rural/urban areas. There is also a need to provide benefits and a competitive advantage in accessing scarce state funds to the local governments that have completed their comprehensive plans and development regulations, thereby positioning themselves to move forward towards more efficient and effective management of the population and economic growth coming to Washington.

III. Specific Recommendations

The Commission's report makes a number of specific recommendations. In addition, the Commission has drafted legislation which implements each of its recommendations. The following is a summary of the recommendations included in the Commission's report and legislation:

A. GMA Requirements

- **Public Participation**

The Commission recommends amending the GMA to require that local governments: (1) take measures reasonably calculated to provide notice of GMA actions to persons affected by those actions or who have expressed an interest, (2) provide an opportunity for public comment before taking action on significant amendments to a comprehensive plan or development regulation, and (3) provide technical assistance to community organizations to assist in developing a comprehensive plan.

- **Monitoring and Evaluation of GMA Progress**

The Commission recommends that a monitoring and evaluation program be established in some of the more populous and faster growing counties. The program would examine the success of the comprehensive plan in meeting its objectives. The county and its cities would be required to take measures to address problems identified in the evaluation. A monitoring and evaluation program would be a new mandate on counties and cities that the Legislature is required to fund under Initiative 601. The Commission is recommending an appropriation to provide the necessary funding.

- **Rural Lands**

The Commission recommends that the rural element be clarified to provide guidance to both counties and the Boards. The rural element should establish a clear framework from which counties can make their planning decisions and require counties to show how they have arrived at these decisions. The rural element should establish a limited number of exceptions that would allow more intensive rural development than is otherwise permitted in the rural area.

- **Agricultural Lands**

The Commission recommends that counties be given authority to adopt a variety of innovative zoning techniques in rural areas. The zoning options would permit some limited non-agricultural

uses in the agricultural zone. The Commission also recommends that the open space/agricultural property tax provisions be expanded to include land that has been designated as open space or agricultural land under a GMA comprehensive plan. The Commission is also recommending that property tax assessments of agricultural land not be based on neighboring properties that have been sold for development purposes.

- **County-City Agreements for Flexibility**

The Commission had considered a proposal to allow a county and its cities to enter into an agreement to modify some elements of the GMA. This has sometimes been referred to as "GMA-flex." The Commission is not making this a recommendation at this time. There are a number of issues with the proposal that the Commission was did not have time to resolve. The Commission does believe that this option is preferable to proposals that would allow a county to "opt-out" of GMA and should be considered as an alternative to opt-out legislation.

B. Review of Local Government Decisions under GMA

- **Standard of Review**

The Commission recommends the standard of review that applies to Board review of local governments decisions under the GMA should be changed to the clearly erroneous standard. The Commission also recommends that an intent section should accompany the change in the statute to clearly state the legislative intent that the change is intended to provide more deference to the decisions of a county or city than the exiting standard provides. The Commission will be looking at the board review process as part of its 1997 workplan.

- **Invalidity**

The Commission recommends that the authority to invalidate comprehensive plans should remain with the Boards. It is recommending changes that clarify that projects that vested prior to the determination are not affected by the order, exempt some types of permits from the effect of a determination of invalidity, and clarify the options available to a local government to have an order lifted.

- **Dispute Resolution**

The Commission recommends that the Boards be allowed to extend the time period for issuing a decision when the parties request additional time for negotiations. The Commission also supports the request in Governor Lowry's budget to provide grants to help state agencies and local governments resolve multi-party public disputes through mediation as an alternative to regulation and litigation.

- **Direct Review by Superior Court**

The Commission is recommending that, if the parties agree, a case on appeal to a Board may be transferred to the Superior Court without a hearing before the Board.

- **Senate Confirmation of Board Members**

The Commission is not recommending any changes to the procedure for appointing members to the Boards. The Commission does not believe that Senate confirmation is inappropriate, but it concluded that requiring Senate confirmation was not likely to provide any significant benefits.

Land Use Study Commission 1996 Annual Report

I. Introduction

A. Progress to date

The Growth Management Act was originally passed by the Legislature in 1990. Prior to that, cities and counties could adopt comprehensive plans, but were not required to do so. Zoning decisions made by local governments were not required to be consistent with the plans that were adopted. The Growth Management Act (GMA) changed this practice for the more populous and faster growing counties and cities in the state.

Over 155 cities and counties have now adopted comprehensive plans under the GMA¹. Many of these jurisdictions have seen improved communication among their staff offices, as well as better communication and coordination with neighboring jurisdictions and citizens from the GMA planning process.² Some of these cities and counties are starting to see some of the fiscal and quality of life benefits that the Legislature expected from having adopted GMA plans and regulations.³

Although the GMA may have been successful in some ways, some jurisdictions have had difficulties developing plans and development regulations that are both acceptable to the community and that comply with the GMA, as determined by the Growth Management Hearings Boards (Boards) and the courts.⁴

One can attribute some of these difficulties to growing pains. The GMA is still in its formative stages. As counties and cities have begun implementing the GMA, some shortcomings in the GMA have been identified. Many of those involved in the debates over the GMA in the early 1990s recognize that some important decisions were not made as part of the legislation. As a consequence, the statute included language sufficiently ambiguous that each interest group could find sufficient comfort to agree that the overall process should go forward. This has made it

¹ As of November 6, 1996, 26 counties were planning under GMA and 14 had adopted comprehensive plans. In addition, 182 cities were planning under GMA and 128 had adopted comprehensive plans.

² Source: Department of Community, Trade, and Economic Development Survey, June 1996. Preliminary results: 76% found increased public participation, 69 % found better coordination with neighboring jurisdictions, 71 % found better knowledge of infrastructure needs, 61 % found more certainty about permitted land uses, and 55 % found more consistency between capital budgets and comprehensive plans. Final report is due in January 1997.

³ See, e.g., *New building code fuels a Kirkland condo boom*, Seattle P-I, November 1996, page B3; .

⁴ As of May 16, 1996, 326 cases had been filed with the Growth Management Hearings Boards. As of that date, 63 plans or development regulations had been remanded for further review and 11 cases were in continuing non-compliance. 48 cases had resulted in findings of compliance and 45 cases were pending. As of November 27, 1996, parts of 11 county comprehensive plans have been found to be invalid. Source: Memo dated May 16, 1996 from Les Eldridge to Harry Reinert; LUSC Issue Paper # 6.

**Land Use Study Commission
1996 Annual Report**

individual circumstances. Added flexibility could also help address some of the harsher impacts changes in the land use system have had on individual property owners.

C. Building Momentum

Cities and counties that have adopted GMA comprehensive plans and development regulations have expressed concern about their ability to effectively implement the plans they have adopted to achieve the benefits GMA is intended to provide. One of the major impediments identified by local governments is the lack of adequate financial resources to pay for infrastructure needed to implement comprehensive plans.

D. Improving the Dispute Resolution Process

The original proponents of the GMA have stated that they intended the Boards to be a place for citizens affected by local planning decisions to be heard without the formality and expense required in judicial proceedings. Many commentators question whether the Boards have developed in a fashion that achieves this objective. In addition, the Boards have faced criticism that they are not being sufficiently deferential to the decisions of local elected officials. Others have noted that the Boards, though controversial, are an essential component in creating certainty and in getting timely decisions.

E. Invalidation of Comprehensive Plans and Development Regulations

The 1995 Legislature gave the Boards the authority to invalidate part or all of a comprehensive plan or development regulation a Board determined to be "substantially interfering" with the goals of the GMA. Once a comprehensive plan or development regulation is determined to be invalid, vesting of projects under that plan or regulation is not allowed. The authority to invalidate was given to the Boards to clarify the impact of a decision by a Board that a comprehensive plan or development regulation did not comply with the GMA. Under the legislation, vesting is not affected by a finding that a plan or regulation does not comply with the GMA. Vesting is only affected by a determination of invalidity.

Since the authority to invalidate plans and regulations was given to the Boards, part or all of eleven county comprehensive plans or development regulations have been determined to be invalid. These determinations have led considerable criticism of the Boards by the elected officials whose decisions have been affected as well as from citizens and businesses adversely affected by the decisions. There are many citizens and organizations who believe the Boards have exercised restraint in use of the invalidity authority and that it is an important tool to encourage a local government to come into compliance with the GMA.

In 1996, the Legislature passed SSB 6637 which included provisions revising the authority of the Boards to invalidate comprehensive plans and development regulations. The Governor vetoed two sections in the bill. In his veto message he asked the Commission to look at the invalidity authority and make recommendations for the 1997 legislative session.

**Land Use Study Commission
1996 Annual Report**

that the GMA's goals need to be recognized. They point out that the "clearly erroneous" standard of review provides additional deference, but that would measure local decisions against the GMA's goals.

The Commission is recommending the "clearly erroneous" test. During the Commission's discussions, it reached the conclusion that arguments over the standard of review, as well as other procedural issues, were largely misplaced. The debate over the standard of review has occurred because the GMA itself is ambiguous in some fundamental areas, particularly in the rural element. Commission members concluded that a less deferential standard of review ("clearly erroneous") would be appropriate if these ambiguities were removed.

RECOMMENDATION:

The Commission recommends the standard of review that applies to Board review of local governments decisions under the GMA should be changed to the clearly erroneous standard. The Commission also recommends that an intent section should accompany the change in the statute to clearly state the legislative intent that the change is intended to be more deferential to local decisions than the current preponderance of the evidence standard.

2. Invalidity

Since their creation, the Boards have had the authority to determine that plans or regulations do not comply with the GMA. This authority led to concerns about the effect of a decision of non-compliance on permit applications and projects that are dependent upon those plans or regulations. The Legislature sought to clarify this impact in 1995 by providing that a determination of non-compliance did not apply to permits unless the Board made a specific finding that the plan or regulation was invalid. This order only applies to permits filed after the date of the Board's order. Those projects are subject to the plan or regulations determined by the Board as complying with the GMA. The Boards have issued approximately 10 invalidity orders since the authority was granted to them.

The exercise of this authority has proven to be a potent tool for encouraging compliance with the GMA. However, it has also proven to be a focus for complaints that the Boards are undermining the original purpose of the GMA that local elected officials should make the planning decisions for their communities. The options considered by the Commission to address this authority ranged from eliminating the authority, to allowing projects to be reviewed under the goals and policies of the GMA until a new plan or development regulations are approved, to clarifying the types of permits affected and not affected by the order.

RECOMMENDATION:

The Commission recommends the authority to invalidate comprehensive plans should remain with the Boards. It is recommending changes that clarify that projects that vested prior to the determination are not affected by the order, exempt some types of permits from the effect of a determination of invalidity, and clarify the options available to a local government to have an order lifted.

APPENDIX 3

Land Use Study Commission

FINAL REPORT

December 1998

Land Use Study Commission

T. Ryan Durkan, Chair
Hillis, Clark, Martin & Peterson
Seattle

Commissioner Phil Best
Kitsap County Board of Commissioners
Bremerton

Sheila Collins
Spokane

Tom Campbell
Seattle

Keith Dearborn
Seattle

Loren Dunn
Vashon Island

Kathy Dietrich
Vancouver

Tom Fitzsimmons, Director
Department of Ecology
Olympia

Mayor Ed Hansen
Everett

David Moseley
City Manager
Ellensburg

Kimberly Ordon
Bothell

David Roseberry
Kennewick

James P. Toohey, Assistant Secretary
WA State Dept of Transportation
Olympia

To obtain this publication in alternative format, contact the Growth Management Program at the

Department of Community, Trade, and Economic Development

Phone: 360.586-1274 ♦ fax: 360.753.2950

This publication is available electronically at <http://www.cted.wa.gov>

LAND USE STUDY COMMISSION

906 COLUMBIA STREET SW • PO BOX 48300 • OLYMPIA, WASHINGTON 98504-8300 •
LANDUSE@CTED.WA.GOV
TELEPHONE: (360)586-1274 • FAX: (360)753-2950 • HTTP://WWW.WA.GOV/CTED/LANDUSE

Members:

T. Ryan Durkan
(Chair)

Commissioner
Phil Best

Tom Campbell

Shella Collins

Keith Dearborn

Kathy Dietrich

Loren Dunn

Tom Fitzsimmons

Mayor Ed Hansen

John Herrick

David Moseley

Kimberly Ordon

Dave Roseberry

James P. Toohy

December 29, 1998

The Honorable Gary Locke
2nd Floor
Legislative Building
Olympia, Washington 98504

Re: *Final Report of the Land Use Study Commission*

Dear Governor Locke:

It is with great pride that I transmit to you the Final Report of the Land Use Study Commission. The Report represents a three-year effort by our volunteer Commission to make recommendations on the development of a consolidated land use code.

There is a consensus among Commission members that a consolidated land use code has the potential for many positive benefits; however, at this time, the statewide consensus necessary for its adoption and implementation is not present. The Commission has reached its conclusion based on an extensive public outreach program. This conclusion does not mean that a quest for a consolidated land use code must come to an end. The Commission's Final Report is an important milestone toward reaching the goal of improving our regulatory system. The Report provides detailed guidance on the issues that need to be addressed, and a thorough discussion of options and policy issues that need to be resolved. These policy issues are the domain of the executive and legislative branches of the government.

If the State decides to proceed further with such a code, there are significant prerequisites to achieve the necessary consensus. First, there must be a commitment from the legislative and executive branches that a consolidated land use code is worth the considerable effort that it will take to implement such sweeping changes. Specific direction on key policy issues identified in the Final Report would aid in the development of the code. Second, a successor entity would be required to actually develop the statutory version of the Consolidated Land Use Code.

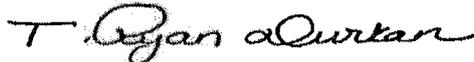
The State of Washington is facing many challenges, including threatened salmon runs, continued population growth, rising housing costs, buildable land supply issues, transportation concurrency issues, and tremendous infrastructure financing needs. These issues will continue to put strains on our existing land use system. We can try to meet these challenges under our current system. By implementing the ideas presented in this Final Report, we have the opportunity to meet these challenges in a better, integrated way with improved clarity. To achieve these goals, a strong political will must emerge to lead the way.

We trust that you will find the discussion in this Report both useful and stimulating. If I can be of further assistance, please do not hesitate to call.

Staff:

Harry Reinert
Julie Knackstedt

Very truly yours,



T. Ryan Durkan
Chair, Land Use Study Commission

Table of Contents

TABLE OF CONTENTS	i
PREFACE	vii
CHAPTER 1 INTRODUCTION	1
CHAPTER 2 SUMMARY OF RECOMMENDATIONS	
Overall Recommendation	3
Governance.....	3
Planning	3
Environmental Review and Permitting	4
Essential Public Facilities	5
Appeals and Judicial Review	5
Enforcement.....	7
Funding	8
Impact of Vesting During Appeals	8
CHAPTER 3 WHERE WE ARE	
Pre-GMA Legislation	9
Growth Management Act.....	9
Regulatory Reform	10
Growth Management Act Refinements	10
ESA and Salmon Listings	11
CHAPTER 4 BENEFITS OF A CONSOLIDATED LAND USE CODE	
Protecting and Enhancing Environmental Protection.....	13
Improving Planning and Permitting	13
Improving Intergovernmental Coordination.....	14

Table of Contents

Improving Public Involvement.....	14
Responding to the Endangered Species Act.....	14

CHAPTER 5 CONSOLIDATED LAND USE CODE

Issue Statement.....	15
Background.....	15
Discussion.....	16
Structure of the Code.....	16
Principles.....	17
Statutes Included in Consolidated Land Use Code.....	18
Options.....	19
Status Quo.....	19
Staged Consolidation.....	20
Consolidation in a Single Step.....	20
Recommendation.....	21

CHAPTER 6 SUBJECTS FOR FURTHER CONSIDERATION..... 23

CHAPTER 7 GOVERNANCE

Issue Statement.....	25
Background.....	25
Governance.....	25
State and Local Relationships.....	26
Regional Issues.....	26
Discussion.....	27
Types of Governmental Interests.....	27
Coordinated Decision Making.....	27
Coordinated Decision Making For Project Decisions.....	28
Coordinated Decision Making for Rule or Policy Development.....	29
Options.....	30
Intergovernmental Coordinating Council.....	30
Regional Coordinated Decision Making Process.....	30
Alternative Dispute Resolution.....	31
Recommendations.....	31

CHAPTER 8 PLANNING

Issue Statement.....	33
Background.....	33

Table of Contents

State Agency Coordination.....	33
Planning Enabling Statutes	34
Relationship Between the SMA and the GMA	34
Discussion.....	35
State Agency Planning.....	35
Planning Enabling Statutes	36
GMA and SMA Planning.....	36
Options.....	37
State Planning.....	37
SMA and GMA Integration	39
Recommendations	40
 CHAPTER 9 ENVIRONMENTAL REVIEW AND PERMITTING	
Issue Statement	41
Background.....	41
State Environmental Policy Act	41
Local Government Permit Process.....	42
State and local permit coordination and integration	42
Discussion.....	43
Environmental Review.....	43
Local government permit process	44
State and local permit coordination and integration.....	45
Options.....	45
Threshold Determinations, SEPA, and GMA Integration	45
Environmental Review of Non-Project Actions	47
Permit Coordination and Consolidation	48
Recommendations	50
 CHAPTER 10 ESSENTIAL PUBLIC FACILITY SITING	
Issue Statement	53
Background.....	53
Pre-GMA	53
State Siting Processes	53
GMA.....	53
Discussion.....	54
Options.....	55
Recommendations	56

Table of Contents

CHAPTER 11 APPEALS AND JUDICIAL REVIEW

Issue Statement 57

Background 57

Discussion 58

Options 59

 Status Quo 59

 Eliminate SHB *de novo* Review For Some Decisions 60

 Unified Hearings Board 61

 State Land Use Court 61

 Superior Court 62

 Court of Appeals 63

 Sunset Growth Management Hearings Boards 63

Recommendations 64

CHAPTER 12 ENFORCEMENT

Issue Statement 67

Background 67

 Fines and Penalties 67

 Third Party Enforcement 68

 Natural Resource Damage Assessments 69

 Dedicated Accounts 69

Discussion 70

Options 71

 Civil Penalties 71

 Natural Resource Damage Assessment 71

 Place Penalties and Assessments in a Dedicated Fund 71

 Third-Party Enforcement 72

 Non-monetary and Non-punitive Enforcement Options 72

Recommendations 73

CHAPTER 13 FUNDING

Issue Statement 75

Background 75

Discussion 77

Options 78

 Joint Economic Development Districts 78

 Infrastructure Finance 79

 Regional tax base sharing 79

Table of Contents

Tax Increment Financing.....80
Planning and Environmental Review Fund.....80
Impact fees.....81
Recommendations.....81

CHAPTER 14 STUDY OF THE IMPACT OF VESTING DURING GMHB APPEALS

Issue Statement.....83
Background.....83
 Vesting Law in Washington.....83
 Commission's Mandate.....84
 Vesting Study.....84
Discussion.....85
Recommendation.....87

CHAPTER 15 CONCLUSION.....89

APPENDIX A BACKGROUND OF THE COMMISSION.....91
 Establishment and Duties.....91
 Membership.....92
 1998 Meetings and Public Comment Opportunities.....92
 1998 Legislative Session.....92

APPENDIX B CONSOLIDATED LAND USE CODE FACTORS.....95

APPENDIX C VOLUNTEERS.....97

APPENDIX D SUMMARY OF PUBLIC COMMENT ON DRAFT FINAL REPORT.....99

APPENDIX E COMMENT LETTERS ON DRAFT FINAL REPORT.....115

Summary of Recommendations

Funding

A variety of funding tools should be provided for local governments to use to finance responses to growth related impacts. Some tools that deserve further study include:

- (1) Infrastructure finance;
- (2) Joint economic development districts;
- (3) Interlocal revenue sharing agreements;
- (4) Regional tax-base sharing options;
- (5) Tax increment financing;
- (6) Planning and Environmental Review Fund;
- (7) Non-monetary enforcement; and
- (8) Impact fees.

Impact of Vesting During Appeals

Based on the limited information available from a study prepared for the Commission, no changes to Washington's vesting statutes are recommended at this time to address the specific issue the Commission was asked to consider: whether vesting during a period of time a comprehensive plan is on appeal results in the approval of projects that are inconsistent with a comprehensive plan that is found in compliance with the GMA.

Some Commission members and environmental community representatives expressed disappointment with the data collected. They suggest a further general study of the vesting issue should be considered. The environmental community believes there is anecdotal evidence that Washington's vesting law, which grants vesting at the time a complete application is submitted, creates problems for implementation of the GMA. However, there has been no systematic study to indicate whether vesting in general is a problem.

Since many comprehensive plans have now been adopted, the impact of vesting during the adoption and appeal of comprehensive plans may be less of an issue in the future. Also local governments do have authority to adopt moratoria to limit vesting during plan adoption if a problem arises. Some advocate, however, that the option of a moratorium is not sufficient, and that more direct legislative changes to the vesting laws are appropriate.

There are equally strong views that property rights and vested rights must be strengthened in any future consolidated land use code. Advocates of property rights view the GMA and other environmental laws as infringements of their constitutional rights.

Any legislative change to the current rules on vesting would be a very controversial issue and would need further legal analysis, given the doctrine's judicial roots.

Chapter 14

Study of the Impact of Vesting During GMHB Appeals

Issue Statement

The 1995 legislation granting the Growth Management Hearings Boards the authority to invalidate GMA comprehensive plans and development regulations also directed the Commission to study the impact on the goals of the GMA of allowing non-compliant plans to remain in effect during appeals. This raised several issues about Washington's vesting laws. The study the Commission was directed to undertake only addressed a small subset of the larger issues involving vesting.

Background

Vesting Law in Washington

Vesting in Washington "refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission." *Noble Manor v. Pierce County*, 133 Wn.2d 269, 275 (1997). The vested rights doctrine has been the subject of numerous decisions by the Washington Supreme Court.

The Washington Supreme Court has stated that:

The Washington doctrine protects developers who file a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop. See, e.g., *Allenbach v. Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984). Once a developer complies with these requirements a city cannot frustrate the development by enacting new zoning regulations.

The purpose of the vesting doctrine is to allow developers to determine, or "fix," the rules that will govern their land development. See Comment, *Washington's Zoning Vested Rights Doctrine*, 57 Wash. L. Rev. 139, 147-50 (1981). The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the "fluctuating policy" of the legislature. *The Federalist No. 44*, at 301 (J. Madison) (J. Cooke ed. 1961). Persons should be able to plan their conduct with reasonable certainty of the legal consequences. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960). Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.

West Main Assocs. v. Bellevue, 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986). The court has recognized that the Washington rule, which allows for vesting at the time a complete application is submitted, is not the rule applied in most other states.

Study of the Impact of Vesting During GMHB Appeals

The Supreme Court has also recognized that the vesting doctrine does have other impacts.

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Erickson & Associates v. McLerran, 123 Wn.2d 864,874 (1994).

Commission's Mandate

It's enabling statute directs the Commission to:

Monitor instances state-wide of the vesting of project permit applications during the period that an appeal is pending before a growth management hearings board, as authorized under RCW 36.70A.300. The commission shall also review the extent to which such vesting results in the approval of projects that are inconsistent with a comprehensive plan or development regulation provision ultimately found to be in compliance with a board's order or remand. The commission shall analyze the impact of such approvals on ensuring the attainment of the goals and policies of chapter 36.70A RCW, and make recommendations to the governor and the legislature on statutory changes to address any adverse impacts from the provisions of RCW 36.70A.300. The commission shall provide an initial report on its findings and recommendations by November 1, 1995, and submit its further findings and recommendations subsequently in the reports required under RCW 90.61.030.

RCW 90.61.040(4). The direction to conduct the study was in response to the provision in ESHB 1724 providing that county and city comprehensive plans on appeal to a Growth Management Hearings Board would remain valid, and that projects could vest under those plans and development regulations, unless a Growth Management Hearings Board entered an order to invalidate the plan or development regulation. The study was intended to determine to what extent vesting to those plans and development regulations that did not comply with the GMA interfered with meeting the GMA's goals and policies.

Vesting Study

In order to conduct the study required RCW 90.61.040(4), the Commission contracted with David Evans and Associates to collect the information needed to make the analysis. The Commission concluded that to understand the significance of vesting during a period of non-compliance or invalidity, it is also important to know the amount of permit activity at other significant times during the comprehensive planning process, including the period prior to plan adoption. The contractor was asked to collect the following information:

- For each local government that has been subject to an appeal to a GMHB: the number of completed permit applications submitted (on a monthly basis), beginning from date the local government commenced planning under the GMA; the dates of significant events taken by the local government to comply with the

Study of the Impact of Vesting During GMHB Appeals

GMA (e.g. interim urban growth areas, critical area ordinances, draft comprehensive plan, final comprehensive plan); and the dates of GMHB proceedings (e.g., date of appeal, GMHB hearing, and GMHB decision)

- For each appeal to a GMHB that has resulted in a finding that a local government comprehensive plan or development regulation was not in compliance with the GMA the number of permit applications that vested under that plan or development regulation that was found not in compliance and that would not be permitted under the plan or development regulation that has been adopted and found in compliance with the GMA.
- For each appeal that has resulted in a determination of invalidity for part or all of a comprehensive plan or development regulation the number of permit applications that vested under that plan or development regulation that was determined to be invalid and that would not be permitted under the plan or development regulation that has been adopted and found in compliance with the GMA.

The study limited its review to ten counties that had comprehensive plans or development regulations held invalid or not in compliance with the GMA. Counties were selected because issues involving vesting and GMA goals and policies were more likely to occur in rural areas than in urban areas.⁴² The study examined a limited number of permit types, including formal subdivisions, short subdivisions, planned unit developments, master planned communities, master planned resorts, and major industrial developments.

Discussion

The following is the summary and conclusions from the report submitted to the Commission by David Evans:

There were two major issues which prevented the complete collection of data.

7.1 Data Availability

Timing. Tight time constraints of the study prevented the examination of individual permit files to determine the projects' compliance with the goals of GMA. Additional complications arose with the individual stages of the counties in planning under GMA. In addition to several cases which are still pending before the Boards, some counties (e.g. Skagit and Jefferson) were adopting revised comprehensive plans within the time frame of this study. Staff members involved with those tasks were understandably unavailable to assist in permit data collection. Compliance hearings in these instances have yet to occur.

Databases. Few, if any, jurisdictions have compiled databases of permit information with the intent of tracking the impacts of vested permits. Many of the issues examined by this study require the ability to search using

⁴² The counties were: Chelan, Clark, King, Kitsap, Jefferson, Kittitas, Pacific, Pierce, Skagit, and Whatcom.

Study of the Impact of Vesting During GMHB Appeals

geographical parameters which was not possible. Other technical difficulties arising from the incompatibility of database versions used within some individual jurisdictions which temporarily prevented the use of pre-existing electronic data.

7.2 Suggestions for Further Study.

To more specifically address questions on issues which have the potential to frustrate the goals of GMA requires that individual permit application files be scrutinized by either the Commission, its contractor(s), or county employees. Some questions include:

How many new developments will be built at higher densities than would have been permitted by the plan or regulation deemed compliant by the Board?

How many acres of resource lands will be lost to inappropriate development due to vesting?

The number of hours required for this intensity of data collection is outside the scope of this initial study. Should the Commission or others decide to pursue the issue of vesting further, this appears to be the next logical step.

7.3 General Observations

While the lack of permit data prevented specific, detailed conclusions, general observations on the impact of vesting were made based on the researchers [sic] collective experiences. Two observations are pertinent. First, none of the jurisdictions contacted expressed an opinion that vesting was a major land use issue. Second, to the extent that vesting occurs it appears more often as a local issue and does not have widespread impacts across the jurisdiction.

The normal response of a local government to a land use issue with widespread impacts is to allocate additional resources, draft new land use regulations, or both. The additional resources could be the provision of new staff through the budget process or the reassignment of existing staff. New regulations are often also drafted to provide the legal basis for regulating the subject land use. Sometimes the regulations take the form of a moratorium on permit applications.

With one exception, local governments responding to the survey were not using these tools to respond to vesting. None of the jurisdictions communicated that they had hired new staff or reassigned existing staff to deal with vested permits despite repeated conversations with their staff on the issue from the director level on down. It is our belief that, if vested permits were a considered to be a major land use issue for these jurisdictions, they would have responded to the problem in some fashion and would have informed the researchers. From the researchers inquiries, this was not the case. The only exception was the development moratoria enacted by Jefferson County in response to a potential rush to the permit counter. But the general observation stands that the jurisdictions did not

Study of the Impact of Vesting During GMHB Appeals

perceive there was a major land use issue or controversy associated with vested permits and therefore were not responding as expected.

Nonetheless, based on anecdotal and documented evidence, vested permits can create land use issues on a case-by-case basis. Generally, these cases are localized in their impact. They do not usually set precedent for other applications because of the requirement for submitting the permit within a relatively narrow window of opportunity. Also the cost of preparing complete land use applications sufficient to meet the vesting requirements is not insignificant. These time and cost constraints inhibit decisions by local land owners to act on short notice, thus dampening most potential rushes to the permit counter to take advantage of a window.

Vested permits can impact local land use issues because they may be inconsistent with the existing or proposed land uses. Neighbors and other local residents may be sufficiently upset by the vested permit to file an appeal. But the impacts of the vested permit are usually confined to the immediate surroundings. While these impacts are of importance to the local residents, they are less important to the overall land use plan because of their limited number and scope of impact.

Report on Permits Vested During Periods of Invalidity or Non-Compliance Under the Growth Management Act, Report to the Land Use Study Commission, David Evans and Associates, pp. 24-25 (September 1998)

Recommendation

Based on the limited information available from a study prepared for the Commission, no changes to Washington's vesting statutes are recommended at this time to address the specific issue the Commission was asked to consider: whether vesting during a period of time a comprehensive plan is on appeal results in the approval of projects that are inconsistent with a comprehensive plan that is found in compliance with the GMA.

Some Commission members and environmental community representatives expressed disappointment with the data collected. They suggest a further general study of the vesting issue should be considered. The environmental community believes there is anecdotal evidence that Washington's vesting law, which grants vesting at the time a complete application is submitted, creates problems for implementation of the GMA. However, there has been no systematic study to indicate whether vesting in general is a problem.

Since many comprehensive plans have now been adopted, the impact of vesting during the adoption and appeal of comprehensive plans may be less of an issue in the future. Also local governments do have authority to adopt moratoria to limit vesting during plan adoption if a problem arises. Some advocate, however, that the option of a moratorium is not sufficient, and that more direct legislative changes to the vesting laws are appropriate.

There are equally strong views that property rights and vested rights must be strengthened in any future consolidated land use code. Advocates of property rights view the GMA and other environmental laws as infringements of their constitutional rights.

Study of the Impact of Vesting During GMHB Appeals

Any legislative change to the current rules on vesting would be a very controversial issue and would need further legal analysis, given the doctrine's judicial roots.

RECEIVED BY E-MAIL

DECLARATION OF SERVICE

I, Gloria J. Zak, make the following declaration:

On the 5 day of July, 2013, I provided Woodway's

Supplemental Brief in the following manner:

To the Supreme Court: supreme@courts.wa.gov

To Counsel of Record via Email and Regular Mail:

Attorney for Save Richmond Beach:

Aimee K. Decker, adecker@grahamdunn.com
GRAHAM & DUNN
2801 Alaskan Way, Suite 300, Pier 70
Seattle, WA 98121

Attorney for Sno Co:

John R. Moffat, jmoffat@snoco.org
Martin D. Rollins, mrollins@snoco.org
Matthew A. Otten, motten@snoco.org
Civil Division
Robert Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Avenue
Everett WA 98201-4060

Attorney for BSRE Point Wells

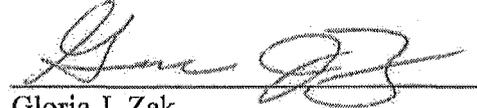
Mark R. Johnsen, mjohnsen@karrtuttle.com
Douglas A. Luetjen, dluetjen@karrtuttle.com
Gary D. Huff, ghuff@karrtuttle.com
KARR TUTTLE CAMPBELL
701 Fifth Avenue, Suite 3300
Seattle WA 98104

I declare under penalty of perjury under the laws of the State of

Washington that the foregoing is true and correct.

WDT1078805.DOCX;2\00074.050009\

EXECUTED at Seattle, Washington this 5 day of July, 2013.


Gloria J. Zak

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, July 05, 2013 3:26 PM
To: 'Gloria J. Zak'
Cc: 'adecker@grahamdunn.com'; 'jmoftat@snoco.org'; 'mrollins@snoco.org';
'motten@snoco.org'; 'mjohnsen@karrtuttle.com'; 'dluetjen@karrtuttle.com';
'ghuff@karrtuttle.com'
Subject: RE: Town of Wooday, et al v. Snohomish County, et al

Received 7/5/13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Gloria J. Zak [<mailto:gzak@omwlaw.com>]
Sent: Friday, July 05, 2013 3:25 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'adecker@grahamdunn.com'; 'jmoftat@snoco.org'; 'mrollins@snoco.org'; 'motten@snoco.org';
'mjohnsen@karrtuttle.com'; 'dluetjen@karrtuttle.com'; 'ghuff@karrtuttle.com'
Subject: Town of Wooday, et al v. Snohomish County, et al

Case No. 88405-6

Attached is

Town of Woodway's Supplemental Brief
Declaration of Service

A hard copy follows to all counsel this date.

Gloria J. Zak | Municipal Legal Assistant

Ogden Murphy Wallace P.L.L.C.
901 Fifth Avenue, Suite 3500 Seattle, WA 98164
phone: 206.447.7000 | fax: 206.447.0215
gzak@omwlaw.com | omwlaw.com

CONFIDENTIAL COMMUNICATION - This communication constitutes an electronic communication within the meaning of the Electronic Communications Privacy Act, 18 U.S.C. Section 2510, and its disclosure is strictly limited to the recipient intended by the sender. It may contain information that is proprietary, privileged, and/or confidential. If you are not the intended recipient, any disclosure, copying, distribution, or use of any of the contents is STRICTLY PROHIBITED. If you have received this message in error, please notify the sender immediately and destroy the original transmission and all copies.