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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.

Very truly yours,

T. Ryan Durkan
Chair, Land Use Study Commission
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Preface

This report was prepared by the Land Use Study Commission, a volunteer group of dedicated individuals who gave an extraordinary amount of time to the Commission's work over the last three years. We would like to specifically acknowledge the work of Commission member Terry Husseman, who died before our work was completed. His dedication and vision continued to inspire us throughout our work.

This report relied heavily on the work of our Advisory Committees, which were staffed by volunteers. We deeply appreciate their efforts and ideas. These talented individuals generously gave large amounts of their time to our work, because they care deeply about the challenges that face our state. A list of those volunteers can be found in Appendix C. We would also like to acknowledge the members of the public who participated in our many public outreach opportunities. The comments we received during this public process were invaluable, and led directly to many revisions incorporated in this final report. A summary of the oral comments on the draft final report can be found in Appendix D. Copies of written comments on the draft final report can be found in Appendix E.

Finally, the Commission would like to acknowledge the dedication and effort of its staff, Julie Knackstedt and Harry Reinert, whose efforts were instrumental in helping the Commission throughout its three years. We wish them the best in their future endeavors.
Chapter 1
Introduction

This is the final report of the Land Use Study Commission. The Land Use Study Commission is the fourth significant effort in Washington in the last ten years to examine issues concerning governance, growth, and the environment. Each of these previous efforts resulted in changes to the land use and environmental system in Washington and improvements in the ways that we deal with the issues involved. The Land Use Study Commission believes that its recommendations further those prior efforts and will maintain and enhance the quality of life in Washington, protect and enhance the environment, improve the way we govern ourselves, and lead to better use of scarce public and private resources.

In each of its prior reports, the Commission focussed on incremental changes to Washington’s laws to address particular issues with the implementation of the Growth Management Act and related statutes. In this final report, the Commission has examined more sweeping changes to Washington law that would be implemented through the adoption of a consolidated land use code. Such sweeping changes will take time and cost money. There must be a public consensus that a consolidated land use code is necessary and beneficial. This consensus does not currently exist. The Commission believes this consensus can be achieved over time. By taking this opportunity to explore the benefits and problems with the consolidated land use code and to suggest how it could be implemented, the Commission will make progress towards the goal of a consolidated land use code. Implementing a consolidated land use code, however, will require sufficient funding and dedicated personnel beyond the resources of a volunteer commission.

The Commission held two public hearings to take comment on its Final Report. One common theme of that comment was that implementation of a consolidated land use code needs to be done with deliberation. Local governments, the public, and the business community are still dealing with changes made to the land use and environmental system over the last several years. In addition, the expected listing of additional salmon stocks under the federal Endangered Species Act calls for careful review of changes to existing laws that may have an impact on the ability of the state to respond to those listings.

In summary, the Land Use Study Commission concludes that a consolidated land use code has the potential for many benefits. At this time, however, there is not the consensus necessary for its final development and adoption. The ideas presented in this final report merit further consideration and exploration. A consolidated land use code will take time to develop and implement. It will also require that adequate funding be an integral part of implementation.

Chapter 2
Summary of Recommendations

The following is summary of recommendations contained in this final report. These recommendations are discussed in greater detail in the following chapters and should be reviewed in the context of that discussion.

Overall Recommendation

The idea of a consolidated land use code has the potential for many positive benefits. At this time, however, there is not the consensus necessary for its final development and adoption. The reasons for that lack of consensus are discussed in more detail in this report. The ideas presented in this final report merit further consideration and exploration. A consolidated land use code will take time to develop and implement. It will also require that adequate funding be an integral part of implementation.

Governance

(1) Establish new, or expand on existing, approaches to shared governance between state and local government. Two options deserving further consideration are:

(a) An intergovernmental council with representation from state government, local government, and the tribes; and

(b) Rule making and decision making procedures that promote shared governance over issues of greater than local concern, such as designation and protection of critical areas, shoreline management, and siting of transportation facilities of regional or state-wide significance.

(2) Provide additional technical assistance to state agencies and local governments on methods to avoid land use and environmental disputes and how and when to use alternative dispute resolution mechanisms. One mechanism deserving further consideration is a state office of dispute resolution to provide that technical assistance.

Planning

(1) Establish a process to better coordinate state agency planning and activities and resolve interagency disputes.

(2) Integrate city and county planning enabling statutes into a single, uniform planning enabling statute applicable to all cities and counties. Coordinate the provisions of the planning enabling statute to remove procedural inconsistencies with the Growth Management Act.

(3) Clarify the procedures for adopting shoreline management programs so that shoreline programs may be more easily integrated into the process for adopting GMA comprehensive plans and development regulations. For example, coordinate the time period for Ecology review of the shoreline
Summary of Recommendations

master program with the time period for state review and comment on a draft GMA comprehensive plan.

Environmental Review and Permitting

(1) Environmental Review.
(a) Provide procedural and substantive guidance for the environmental review of comprehensive plans and development regulations to ensure that cumulative environmental impacts of plan decisions and subsequent implementation are analyzed and addressed.
(b) Consider whether additional changes should be made to the environmental review process to ensure that decisions made as part of the adoption of a comprehensive plan and development regulations, that have been subject to environmental review, are not subject to duplicative review during the project review.

(2) Local Project Review. Establish optional minimum standards for local government administrative hearings in order to make the local government process more thorough and consistent. This is seen as a necessary prerequisite to further consideration of having shoreline permit appeals heard on the record rather than de novo.

(3) 120-day Project Review Time Limit. Designate an entity to study the impacts of the 120-day project review time limit in order to make a recommendation to the legislature and the governor prior to June 30, 2000. The 120-day time limit, originally due to expire in 1998, was extended for two years. The study should examine, among other issues, whether local governments are meeting the timelines, whether the timelines should be modified to recognize the complexity of projects, and whether sanctions for failure to meet the deadlines would be appropriate.

(4) Coordinated State Permit Process.
(a) Extend the permit assistance center.
(b) Consider a pilot project for the integration of state permit requirements into a single permit, such as consolidating Joint Aquatic Resource Permit Application (JARPA) permits into a single permit. The idea of a consolidated state and local permit should also be considered through an appropriate pilot program.

(5) Funding. Develop a consolidated land use code approach that provides sufficient funding to perform adequate environmental review at the planning stage, in order to reduce duplicative environmental review at the project review stage.

(6) SEPA. Further consideration should be given to resolving the key issues that divide stakeholders over the future of SEPA. Some of the issues that deserve further consideration are:

• The environmental community and the Commission’s tribal representative cite SEPA as a cornerstone of environmental protection in our state. At a time when salmon recovery is on the top of the state agenda, they argue that
now is not the time to weaken environmental protection. They refer to circumstances where GMA plans had little or no environmental review, thus requiring such information at the project stage to adequately analyze the environmental impacts of projects. They also point out that cumulative environmental impacts of development are not handled well under the current system, but that project review is the place where it is most likely to occur. They also note that SEPA applies to more than project development and GMA planning, because it applies to all government “action”.

- The business community believes regulatory reform and GMA promised more certainty in the permit process, but in reality that predictability has not occurred. In their view, SEPA and the duplicative layers of process are still used as a tool to slow down projects, which adds to the problem of affordable housing in our region.

- Local governments cite the lack of available funds to do detailed and comprehensive environmental review at the planning stage. They also indicate that many times property owners are either unsure of development plans or are unwilling to share such plans at the planning stage; thus, environmental review cannot always predict accurately what will actually be built.

A resolution of these issues will need further careful deliberation and consensus building. The dialogue should continue. After the salmon recovery plan is in place, and further GMA plans are in place, it is possible the context will be different. Adequate funding of environmental review will be necessary at the plan stage to implement any reforms.

**Essential Public Facilities**

Improved procedures for siting essential public facilities should be established. In particular, the new procedures should address the definition of essential public facilities and methods to provide impact compensation and mitigation to communities impacted by the facilities.

**Appeals and Judicial Review**

Although nearly all parties agree that the current system for review of land use and environmental decisions is not perfect, there is no consensus to support any major changes to the land use and environmental appeals process at this time.

There is speculation that GMA appeals will diminish over time, however the Growth Management Hearings Boards currently have an adequate work load. The Commission’s recommendation is to maintain the status quo for the time being, while giving further study to the alternatives and the issues that divide the constituents who care deeply about this issue.

Some of the issues on which there are significant divisions include:

- The environmental community, neighborhood groups, and tribes believe that the existing layers of appeals serve as an added element of environmental protection. They argue that the current appeal system works well and that there is no evidence showing any significant problems. They point out that many of
the environmental statutes address matters that are of state-wide concern and that the appeal process should protect those state-wide interests. At a time when salmon recovery is a concern, they advocate that this is not the time to tinker with the Shoreline Hearings Board. They also cite to the expertise of the Shoreline Hearings Board and the Growth Management Hearings Boards in environmental and land use matters. They also prefer administrative boards because such forums are more accessible to non-lawyers. Some neighborhood groups view state or regional administrative boards as more independent of local elected officials than superior court. Environmental groups object to one provision added in 1995 legislation that provides for an award of attorneys’ fees to the prevailing party in cases on appeal to the Court of Appeals. If the plaintiff has not prevailed before the local government or the superior court and loses at the Court of Appeals, reasonable attorney’s fees can be imposed against the plaintiff. They believe the potential for an award of attorneys’ fees acts as a disincentive for the filing of legitimate actions.

- The business community cites to duplicative and inconsistent appeals statutes that can result in one project being appealed to different forums. They cite to the cost of de novo review, where local government proceedings on shoreline permits become meaningless if appealed to the Shoreline Hearings Board. They express concern with the Growth Management Hearings Board substituting its judgment for that of local elected officials and believe that superior courts have more experience in respecting the separation of powers.

- Local governments express frustration with the shoreline permitting process where new information and evidence may be produced at the de novo hearing, without giving local elected officials the right to review the new evidence. They would prefer an option that would provide for a hearing on the local government record if the local government conducts the hearing consistent with minimal standards for the conduct of administrative hearings. Local governments also referred to the “stove-piping” of issues that can occur under the current system, where shoreline and upland impacts are reviewed in two different systems, when GMA was directed at an integrated approach. Some local governments also expressed frustration with having an appointed board overturning the decision of local elected officials.

- State agencies had differing views. WSDOT spoke in favor of the status quo. Ecology and DNR agreed that in the perfect world, they would be able to present their concerns to local officials first. The current shoreline permit system allows state agencies to wait and raise their concerns for the first time in an appeal to the Shoreline Hearings Board. Although they recognize the potential for unfairness and inefficiency in such a system, it is a personnel resource issue. At present, they do not have the staff or other resources to stay informed and participate in all local projects. Even if the agency is notified of a project, it is not always adequately funded to participate in the local permit review process. The tribes have similar personnel resource issues.

- Some rural land owners believe that the Growth Management Hearings Boards have too much authority. They see the judicial system as the forum to correct the problems created by the boards. These rural land owners believe that judicial review combined with governor sanctions are the best tools to ensure
that counties and cities are complying with the GMA. They believe that this system will also honor the GMA’s promise of local control.

- The Commission’s agricultural representative from Eastern Washington noted the importance of geographic diversity of the decision makers participating in the appeals process. He felt it was important to maintain that diversity in the future.

**Enforcement**

Mechanisms to enforce development regulations and permit conditions is an issue that must be addressed by a consolidated land use code. There are many options that merit further consideration, as outlined in the body of this report. There was a consensus on the Commission for a fair system of enforcing permit conditions and for the need for additional enforcement of existing laws and regulations. However, there was not consensus on whether new enforcement mechanisms are necessary or what they should be. Some of the views are as follows:

- Local governments cite a lack of sufficient funding for permit enforcement. Local permitting and inspection efforts vary greatly from community to community. Local enforcement efforts generally reflect local levels of development pressure and local issues. Smaller jurisdictions often have only one inspector to cover a very large area. Some local governments have innovative enforcement ordinances, such as Island County where third party enforcement is allowed. Local governments make it clear that unfunded mandates would not be welcome.

- The environmental community, neighborhood groups, and the Commission’s tribal representative cite cases where permit conditions are not implemented or monitored, leading to environmental harm. They believe more enforcement options, and perhaps mandates, are needed. The environmental community advocates for the right to act as private attorneys general, and the right to recoup attorneys’ fees for the prevailing plaintiff. A prevailing defendant would be entitled to attorneys’ fees only if the action was found to be frivolous or brought for purposes of harassment.

- The business community states that enforcement needs more study, and should be based on facts, not anecdotal evidence. They note that many of the ideas presented in the discussion of the issue can already be implemented and that legislation is not necessary. They fear increased litigation costs and permit fees to cover enforcement costs. Small builders cite permit fees as one problem standing in the way of affordable housing. The business community opposes private attorney general suits. They also believe that a system under which only plaintiffs get attorneys’ fees is unfair and will lead to increased litigation and frivolous suits. They also note that if private attorney general suits are authorized, they should apply only to post construction issues. Otherwise, project opponents can stop projects during construction when financing is vulnerable.

- State agencies note that the objective is compliance, not enforcement, and suggest greater focus on the use of existing enforcement tools. An analysis of where the problems occur may lead to better environmental protection. For example, King County performed a study on wetland mitigation. Problems occurred at all stages, including design, construction, and enforcement.
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 3
Where We Are

Pre-GMA Legislation

Prior to 1990 and the enactment of the Growth Management Act, Washington adopted several measures designed to address land use and environmental concerns in the state.

The overarching statute is the State Environmental Policy Act (SEPA) adopted in 1972. SEPA was modeled on the federal National Environmental Policy Act (NEPA) originally sponsored by Senator Henry Jackson of Washington. SEPA applies to nearly every governmental action that has the potential for adversely impacting the environment and it applies to all levels of government in Washington. Although it has its detractors, and complaints about its process are frequent, few criticize one its underlying purposes – to inform decision makers about the environmental impacts of their decisions. For its supporters, SEPA is viewed as the most important tool available to protect against environmental degradation.

The Shoreline Management Act (SMA) was also adopted in the early 1970s, at about the same time as SEPA, by a vote of the people. The SMA approved by the voters was a legislative alternative to a proposal put forward by the environmental community. As with SEPA, there are those who object to some of the procedural aspects of the SMA. But also as with SEPA, few dispute the underlying purpose of the SMA to protect the state’s shorelines. With only a few exceptions, every city and county required to adopt a shoreline master program has completed that task. Many jurisdictions have updated their plans over the years to keep them current with scientific knowledge and changes in circumstances. The SMA has been largely effective in limiting many types of development that were common prior to its adoption. As a result, the shorelines look considerably different than they would have if there had been no SMA.

Growth Management Act

The Growth Management Act (GMA), adopted in two steps in 1990 and 1991, was an outgrowth of recommendations from the Growth Strategies Commission appointed by Governor Gardner in 1989. The GMA initially required 19 counties and their cities to adopt comprehensive plans and development regulations to plan for and address the impacts of growth. Perhaps the most important change made by the GMA to the local government land use process was the requirement that development regulations be consistent with the comprehensive plans. Coupled with limitations on how often a comprehensive plan can be changed, this substantially changed the way land use issues were addressed by counties and cities.

As of early November, 1998, 29 counties and 213 cities were required to have comprehensive plans adopted by December 1, 1998. 23 counties (79 %) and 188 cities (88%) had met that requirement. This is an indication of substantial progress towards meeting the goals and policies of the GMA.
Regulatory Reform

In 1993, Governor Lowry created the Governor’s Task Force on Regulatory Reform in part to address land use issues not resolved by the Growth Management Act. He charged the Task Force with looking at how “the state’s environmental and growth management requirements and processes [can] be integrated so that the goals of environmental protection, orderly and planned growth, and sustained economic development are achieved.”\(^2\) The Governor also directed the task force to look at project approval, permitting, and appeal processes.

The Task Force reported its final recommendations on December 20, 1994. Many of its recommendations concerning the integration of land use and environmental laws and permitting and appeal reforms were incorporated into ESHB 1724, passed by the Legislature in the 1995 session.

ESHB 1724 included some substantial changes to the local government procedures for reviewing proposed development. It required the local government to make a decision on an application within 120 days after a complete application was submitted. It also required the local government to limit the numbers of hearings on an application and to provide a procedure for coordinated local government permit review.

ESHB 1724 also included provisions to begin integrating SEPA, SMA, and the GMA. It provided a means by which counties and cities could resolve with finality some land use issues during comprehensive plan development. With appropriate environmental review, these decisions would not be subject to environmental review during the project review process. ESHB 1724 also provided for some integration of shoreline master programs and GMA comprehensive plans, by incorporating the goals and polices of the SMA into the GMA. Procedural aspects relating to the adoption of those different plans were not addressed at that time.

ESHB 1724 also reformed the archaic process for judicial review of local government land use decisions and replaced it with the Land Use Petition Act. Although some problems with the new legislation have been identified, by nearly all measures it has brought greater certainty and fairness to the judicial review of land use decisions and allows those decisions more often to be resolved on the merits rather than on procedural technicalities.

ESHB 1724 also provided for the establishment of the Permit Assistance Center in Ecology and for a coordinated project review process at the state level. The Permit Assistance Center has recently undergone sunset review and has received a positive review. It has assisted thousands by providing information about state and local permit requirements. It has also overseen a limited number of consolidated permit reviews.

Growth Management Act Refinements

In its first substantive recommendations to the Governor and the Legislature, the Commission in 1997 recommended modifications to the GMA in order to resolve some of the issues about which the Commission heard frequent comment during its

\(^2\) Executive Order 93-06 (August 1993).
first year. With the passage of ESB 6094 by the 1997 Legislature, several nagging
issues with the GMA were addressed.

Most significant among the changes was the addition of more legislative direction to
counties on what was expected in the rural element of their comprehensive plans. In
addition, counties were given clear choices to allow for development in rural areas
consistent with rural character. ESB 6094 also addressed several aspects of the
Growth Management Hearings Boards, including the standard of review that they
apply and the implementation of their authority to invalidate comprehensive plans
and development regulations. These changes, while not resolving all of the
disagreements over the Boards and their place in the land use regulatory system,
did address some of the problem areas to a considerable extent. Since enactment
of ESB 6094 discussion about the GMHBs has been more often focussed on what
their role should be and less on the decisions that they have rendered.

**ESA and Salmon Listings**

The future for Washington’s land use and regulatory system holds many unknowns.
A significant reason for that is the anticipated listing of several salmon stocks under
the federal Endangered Species Act (ESA). Large areas of Washington are likely to
be affected by the listings, including most of the major population centers in the
state. The response to the listings is still unknown, the ESA’s broad sweep
will ensure that nearly all governmental actions affecting salmon habitat, including
water quality and quantity regulations, land use, forest practices, and stormwater
control, will be affected. This will also have a direct impact on the private sector.

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3 *Extinction is Not an Option: A Statewide Strategy to Recover Salmon*, Ch. II, p. 1, Joint Natural
Chapter 4
Benefits of a Consolidated Land Use Code

The Commission was established by the Legislature in 1995 to develop a consolidated land use code, described by the Legislature as the integration and consolidation of the Washington’s land use and environmental laws into a “single manageable statute.” The reasons for developing a consolidated land use code are numerous.

Governor Locke succinctly stated the benefits of a consolidated land use code in his Executive Order extending the Land Use Study Commission.4 He identified five benefits:

• Protecting and enhancing important environmental values;
• Improving the planning and permitting processes without sacrificing environmental protection;
• Improving cooperation among all levels of federal, state, and local government;
• Increasing public involvement in the land use system; and
• Assisting in the response to listings under the ESA.

Protecting and Enhancing Environmental Protection

Over the last thirty years, the Legislature has adopted many new laws designed to protect or address specific environmental concerns. These laws have generally been added to the existing array of statutes, rather than replacing them. This has resulted in a complicated layer of regulatory provisions that can be difficult to unravel. The statutes have different policies and goals because they have been adopted for different purposes. They impose different requirements on governmental agencies and the public that may duplicate or conflict with requirements of other statutes. This makes implementation and enforcement difficult and can adversely affect the success of the statute in achieving its objectives.

By eliminating duplicate or conflicting provisions and clarifying the state’s goals and policies, a consolidated land use code will improve the ability of local and state governments to implement and enforce laws designed to protect the environment. Resources of all parties can be devoted to issues that are of greatest value to protecting the environment.

Improving Planning and Permitting

The Growth Management Act and subsequent legislation initiated a process that has led to improvements in the land use planning in Washington. By further coordinating the decisions and processes in the planning process with the permitting process, a consolidated land use code can result in a system that provides for better understanding of the environmental impacts of planning decisions and the

4 Executive Order 98-01.
cumulative environmental impacts of those decisions. At a time when significant population growth is projected for the state, being prepared to address this growth and its impacts in a methodical and consolidated manner will be important. At the same time, the project review process can be made more efficient by reforming those parts of the process that result in duplication of effort. Cost savings in the permit process can also assist in meeting housing affordability goals.

**Improving Intergovernmental Coordination**

The land use and environmental regulatory system requires a partnership between a wide array of governmental entities. Local, state, tribal, and federal governments all have an interest in the system. State and federal laws assign authority to the different levels of government for implementation. If governments act independently of each other, they can duplicate or counteract the efforts of others. A consolidated land use code can clarify the responsibilities of different levels of government resulting in more efficient use of public resources and a better implementation of state and federal law. More even distribution of economic development could be addressed, as could matching state resources to areas planned for growth.

**Improving Public Involvement**

Public participation and approval of land use and environmental decisions is essential to a well functioning system. Public participation provides a barometer of the public’s views. Public participation also acts as the conscience of the community. Public approval is also important to an efficient permitting system. Public opposition to a project results in delays that add to costs and frustration on all sides. Meaningful public participation should be a fundamental principle of a consolidated land use code. One of the chief obstacles to public participation is the time and energy required for members of the public to attend hearings and meetings and to know who will be making critical decisions. A consolidated land use code that simplifies the land use decision making process and that provides clear guidelines on when decisions will be made will enhance public participation.

**Responding to the Endangered Species Act**

In early 1999, several salmon runs likely will be placed on the list of threatened or endangered species under the federal Endangered Species Act, adding to those that have already been listed. Significant portions of Washington, including many of its most populous areas, will be affected by the listings. The Washington State Joint Natural Resources Cabinet released its first working draft of a statewide strategy to recover salmon on September 25, 1998. The working draft addresses issues involving water resources, land use, habitat, and stormwater. There is a strong likelihood that the final strategy proposed by the Governor to the National Marine Fisheries Service will have wide ranging impacts on many of the Washington’s land use and environmental laws. A consolidated land use code, through improved enforcement and better use of scarce state and local resources, can serve as an important component of a recovery strategy.
Chapter 5
Consolidated Land Use Code

Issue Statement

The Land Use Study Commission was directed by the Legislature to develop a consolidated land use code. Enactment of a consolidated land use code will result in significant changes to the way participants in the land use system interact with each other and with the regulatory system. The possibility of changes has raised concerns that they will diminish some important components of the current land use and environmental regulatory system, create more rather less confusion, and provide no significant procedural improvements. In addition, enactment of a consolidated land use code in a single step, rather than over time, will have significant impacts on local and state governments at a time when they are grappling with other important issues.

Background

The 1995 Legislature made the following statement as the first section of ESHB 1724, the Legislation creating the Commission:

The legislature recognizes by this act that the growth management act is a fundamental building block of regulatory reform. The state and local governments have invested considerable resources in an act that should serve as the integrating framework for all other land-use related laws. The growth management act provides the means to effectively combine certainty for development decisions, reasonable environmental protection, long-range planning for cost-effective infrastructure, and orderly growth and development.

L. 1995, Ch. 347, § 1.

The Commission’s enabling statute gives the following direction to the Commission:

The commission’s goal shall be the integration and consolidation of the state’s land use and environmental laws into a single, manageable statute. In fulfilling its responsibilities, the commission shall evaluate the effectiveness of the growth management act, the state environmental policy act, the shoreline management act, and other state land use, planning, environmental, and permitting statutes in achieving their stated goals.

RCW 90.61.010 (repealed effective June 30, 1998).\(^5\)

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\(^5\) See Appendix B for a summary of the legislative direction for the consolidated land use code.
Discussion

Structure of the Code.

The Commission identified over a dozen existing chapters of the Revised Code of Washington that might be included in a consolidated land use code. In its review of these laws, the Commission identified the different chapters that could hold the various provisions of those laws. These categories would translate into chapters of the consolidated land use code.

A consolidated land use code could have the following chapters:

- **Policies**: The major policies that guide state land-use and environmental laws, including policies concerning growth management, shorelines management, and environmental protection.
- **Definitions**: A consolidated definitions chapter.
- **State and Local Responsibilities**: The state’s roles and responsibilities with respect to environmental and land use laws and the framework for local government authority within the context of the state’s policies.
- **Coordinated State Planning**: Coordination of state agency activities related to environmental and land use policies.
- **Local and Regional Planning**: A comprehensive planning statute integrating the planning enabling statutes with the GMA. It could also include regional transportation planning laws.
- **Environmental Analysis**: Coordinating the state environmental policy act into the framework of the consolidated land use code.
- **Development Regulations**: The use and application of development regulations as they provide controlling policy for local land-use and environmental regulations.
- **Subdivision of Land**: The process for subdividing land.
- **Project Review and Permitting**: The guidelines for conducting state and local project review, consolidated permit processes, and public involvement in those processes.
- **Funding**: Funding for infrastructure, impact fees, and incentives to coordinate actions among different governments.
- **Enforcement**: The consequences of non-compliance.
- **Appeals and Judicial Review**: Administrative and judicial review of state and local government land use planning and project decisions.
- **Miscellaneous**: This chapter includes severability sections, effective dates, and other existing statutory provisions that do not fit in another category.

These chapters are discussed later in the report under the following subject headings:

- **Governance**: Policies; State and Local Responsibilities
- **Planning**: Coordinated State Planning; Local and Regional Planning
• **Environmental Review and Permitting:** Environmental Analysis; Development Regulations; Subdivision of Land; Project Review and Permitting

• **Appeals and Judicial Review**

• **Enforcement**

• **Funding**

**Principles**

As a result of the hearings it held over the last three years, the Commission concluded that a consolidated land use code would be an effective means of accomplishing the legislative goal of using the GMA as the integrating framework for land use and environmental law in Washington. The Commission adopted four principles to guide its development of a consolidated land use code. They are:

• Protection of environmental values must be as strong or stronger than today;

• The permit system must be more efficient for all applicants, big and small without sacrificing environmental protection;

• The total cost for complying with the code for counties and cities must be no greater than it is today; and

• The opportunity for meaningful public participation in all stages of the planning and permitting process must be retained or enhanced.

Any subsequent effort to implement a consolidated land use code may want to elaborate on these goals and how they can be improved. There were also a number of views expressed over the proper phasing and weight to be given each of the goals, as discussed below.

**Protection of the Environment**

A primary goal of many of the statutes included in the consolidated land use code is the protection of specific environmental resources or inclusion of environmental values in the decision making process. The consolidated land use code should not only maintain these goals, but can enhance them. This will be necessary to gain the public support to make the changes. Some expressed the view that environmental protection must be stronger than it is today, because they view current laws as not accomplishing sufficient protection. Others view the regulatory process as not giving sufficient deference to property rights.

**Permit System Efficiency**

The permit system is the chief means by which land use and environmental policies are implemented. An inefficient permitting system does not further those policies and can lead to frustration and efforts to undermine or weaken the policies. An efficient permitting system should further those policies at the least cost to the participants. However, efficiency should not be used as a means to undermine environmental protection.

**System Costs**

The consolidated land use code should have demonstrable benefits to all parties. Local governments and the public are still catching up with the changes enacted over the last several years. Many costs were created by vague GMA requirements.
Consolidated Land Use Code

Future changes to state laws must provide more clarity and certainty to existing processes. Some believe a consolidated land use code will require increased costs, in order to protect the environment, and that a goal of no cost increase is not realistic. Local governments are firm in their claim that there should be no unfunded mandates. Small builders point to new or higher permit fees as an obstacle to affordable housing. In sum, adequate funding is an essential element of a consolidated land use code.

Public Participation

A consolidated land use code must result in at least the same level of public participation as today. Its objective should be to enhance and make public participation opportunities more meaningful.

Statutes Included in Consolidated Land Use Code

The Consolidated Land Use Code proposed by the Commission would create a new title in the Revised Code of Washington and move existing provisions of several statutes into that title. The major statutes that would be moved include:

- State Environmental Policy Act (RCW 43.21C)
- Growth Management Act (RCW 36.70A)
- Shoreline Management Act (RCW 90.58)
- Environmental Hearings Office (RCW 43.21B)
- Planning Enabling Statutes (RCW 35.63, 35A.63, and 36.70)
- Regional Transportation Planning Act (RCW 47.80)
- Subdivision and Platting Statute (RCW 58.17)
- Impact Fees (RCW 82.02)
- Project Review (RCW 36.70B)
- Land Use Petition Act (RCW 36.70C)

Other statutes may also be appropriate for inclusion in the consolidated land use code. For example, school districts and port districts play an important role in land use decisions, but are not governed by the GMA. Over time, additional statutes may also be consolidated into the code. For example, a number of other special purpose districts operate under separate planning statutes which can lead to fragmented land use planning. See, e.g., RCW 57.16.010 requiring water-sewer districts to adopt a comprehensive plan before undertaking certain kinds of actions. Hydraulic project approvals and certain forest practices (Class IV conversions) are also candidates for inclusion in the consolidated land use code.

The GMA should serve as the integrating framework for land use and environmental decisions. Integrating environmental protection into the land use planning and decision making process is controversial. Many of the GMA decisions local governments have made are based on certain assumptions, such as that current SEPA with its EIS process is available to address specific impacts of individual projects. The transition to a system where some significant land use decisions are made during development and adoption of comprehensive plans and development regulations will require adjustments on the part of local governments and the public.
In some cases it may require local governments to revisit planning decisions made and development regulations adopted in the past to assure that environmental impacts have been adequately analyzed and addressed. In other cases, it may result in limitations on the issues neighbors may be able to raise during project review.

Some environmental groups believe that SEPA and the SMA should remain as independent statutes. The tribes also strongly believe in the need to retain these as separate laws. They also point out that other laws, such as those governing forest practices, flood control, and shellfish protection are important for environmental protection and are not necessarily governed by the GMA.

Process is the tool most of these statutes use for protecting the environment. A consolidated land use code offers the opportunity to replace process with substance, but this is an opportunity that will require considerable effort to be achieved.

Options

The Governor and the Legislature must evaluate what direction Washington’s land use and environmental laws should take. There are three basic choices: the status quo, staged consolidation, or consolidation in a single step. Each is discussed below.

Status Quo

This option would not make any systematic changes to the land use and environmental laws. Changes necessary to address specific problems or issues would be handled individually rather than as part of a consolidated land use code.

Pros:

• There are many who believe that the need for a consolidated land use code has not been demonstrated. If there are problems or issues with specific statutes, they suggest these should be addressed individually. They believe wholesale changes to existing law, even if done over time, will cause more problems than it will solve.

• The current land use and environmental system has evolved over time and includes not only statutes but judicial interpretations. Members of the environmental community express concern that the changes contemplated by a consolidated land use code would disrupt these years of practice and experience and cause more litigation and uncertainty.

Cons:

• There are some who believe that the current land use and environmental system does not function well. They see it as too costly. They note that part of the problem is due to the piecemeal changes that have been enacted over the years. They believe there is a need to review the system as a whole and make the changes necessary to more effectively achieve the goals of the different environmental and land use laws.

• Some in the development community believe that the current system has created an atmosphere of mitigation through litigation. They believe that process becomes a substitute for environmental standards.
Consolidated Land Use Code

Staged Consolidation
Another option is to take a first step towards implementation of a consolidated land use code – existing land use and environmental laws could be recodified within a new title of the Revised Code of Washington. Future efforts would focus on more fully integrating these different statutes with one another and addressing the substantive changes discussed elsewhere in this report.

Pros:
- Proponents of this option suggest that placing related environmental and land use statutes into proximity with each other will make it easier to understand the relationships between the different statutory provisions.
- Proponents also argue that this approach will allow time for parties to adjust to the changes and assure that implementation goes smoothly. If sufficient time is allowed between adoption of the different stages and their effective date, problems can be identified and corrected before the changes go into effect.

Cons:
- Local governments express concern about the unknown impacts that recodifying existing statutes will have on local governments. They suggest that at a minimum, there will be a need to review local codes to change statutory references. This will take time and cost money that could be better spent on other tasks.
- Some in the business community see this option as amounting to no more than a cosmetic change that does not get at the real value of integrating the different land use and environmental statutes.
- Members of the environmental community are concerned about unintended case law consequences that might result.

Consolidation in a Single Step
Under this option, the entire consolidated land use code would be developed and adopted as a whole.

Pros:
- Proponents of this option note that it would give more time to the development of ideas presented in this report.
- Proponents also suggest that this option will be more likely to ensure that consolidation results in a consistent code that integrates the different statutes.

Cons:
- Some in the local government and environmental communities believe that the changes to existing procedures and systems that would be brought about by a consolidated land use code implemented at one time could be too disruptive. They fear that at a time when local and state governments have limited resources, they will be forced to address procedural issues that may not provide any clear environmental benefit.
Some in the environmental community are concerned that in integrating different statutes into a consolidated land use code, important state policies will lose out to the desire to achieve efficiency.

**Recommendation**

The idea of a consolidated land use code has the potential for many positive benefits. At this time, however, there is not the consensus necessary for its final development and adoption. The reasons for that lack of consensus are discussed in more detail in this report. The ideas presented in this final report merit further consideration and exploration. A consolidated land use code will take time to develop and implement. It will also require that adequate funding be an integral part of implementation.
Chapter 6
Subjects for Further Consideration

A consolidated land use code provides the state an opportunity to address a number of issues that complicate today’s land use regulatory system. The next chapters address the following topics:

- Governance
- Planning and Project Review
- Essential Public Facilities
- Appeals and Judicial Review
- Enforcement
- Funding
- Vesting

These chapters explore these issues, provide background information, discuss problems, and identify options.
Chapter 7
Governance

Issue Statement

Washington has a strong tradition of local control. Some issues facing local governments have impacts that are of concern to a region or statewide. Effective implementation of many land use and environmental laws requires cooperation among different levels of government. There are some mechanisms available to coordinate or share decision making authority between the different levels of government, but there are a number of areas where these mechanisms are not available or have not yet been tried.

Background

Governance

Washington has a complex governmental structure that involves a variety of state and local governments with different authority and responsibility. Governance issues arise around the relationship between different levels of government, such as between the state and counties and cities; between the same types of governments, such as between cities and counties; and between different types of governments, such as between cities and counties and special purpose districts.

At the local government level, the different local governments often have overlapping authority. This can lead to conflicts over territorial jurisdiction, particularly when the local government with jurisdiction receives financial benefits through additional tax revenue. Conflicts between the state and local governments often involve issues of authority and control. The state, through the Legislature and the Executive, seek to exercise authority over issues that it believes to be of state-wide concern. Local governments often view this as intervention in matters of mostly local concern.

Washington’s local government structure has been the subject of several studies over the years, including the Washington State Local Governance Study Commission, which issued its report in January 1988. The first paragraph of the Governance Study Commission’s Recommendations states:

Washington local governments are fighting a losing battle to fulfill their responsibilities in today’s changing world. Their powers fall short of their problems: their structures are often outdated, and hard to change; most of all, their revenues are inadequate for the services they are expected or required to perform. Frequently there are too many local governments, particularly in densely populated areas outside of cities, and too little coordination among them in coping with problems that often cross jurisdiction lines. Citizens feel uninvolved and unrepresented in the cumbersome processes through which local governments are obliged to operate.

Governance

although much as changed since the report was written. Most significantly, the GMA addressed some of the issues concerning coordination among local governments. The GMA also addressed the issue of public involvement.

State and Local Relationships

The traditional relationship between state and local government has tended towards a hierarchical structure. Local governments generally can only exercise the authority given them by the state either by statute or by the constitution. The constitution allows local governments to make and enforce laws not in conflict with the state’s general laws. In some subject matter areas, the state has exercised its authority to such an extent that local governments are prohibited from taking any independent action or may be limited in the actions that they are authorized to take. In other subject matter areas, the state may have either explicitly given authority to local governments or may not have taken any action to restrict the inherent authority of local governments. This arrangement has resulted in a complicated array of authority between local and state government that varies depending on the particular subject matter.

One example of the relationship between state and local governments can be found in the Shoreline Management Act (SMA). The SMA establishes broad state policy goals and purposes. It gives a state agency (Ecology) the authority to adopt rules implementing the statute. Local governments are required to take action consistent with the statute and Ecology rules. Ecology must approve some local government actions and has the authority to review and appeal others. A state board is established by the SMA to hear appeals of Ecology and local government decisions under the SMA.

An example of a different type of relationship can be found in the GMA. The GMA also establishes broad state policies and goals. A state agency (Community, Trade, and Economic Development) has authority to adopt rules as guidance, but not as mandatory requirements. State agencies have a right to review and comment on local government decisions under the GMA, but they do not have approval authority. A state agency may appeal a local government’s actions under the GMA to a state board. Local government actions under the GMA are presumed valid upon adoption. The board is required to uphold the local government decision unless it determines the action was clearly erroneous.

Regional Issues

The state/local relationship turns in part on the regional scope of the interest that is in question. Some issues are of only local concern and do not require involvement or affect the interests of a broader community. Other interests have impacts on a region or implicate interests that are of regional or statewide importance.

The Legislature has provided some mechanisms to address regional issues. For example, Regional Transportation Planning Organizations (RTPOs) were authorized by the legislature in 1990 as part of the Growth Management Act. They are voluntarily created by local governments to coordinate transportation planning among jurisdictions and to develop a regional transportation plan. Local comprehensive plans and regional plans must be consistent. The RTPO also has authority to certify that local transportation elements of comprehensive plans are consistent with the regional transportation plan.
The 1998 Legislature added to the importance of regional transportation planning in SHB 1487. That legislation requires the state to work with local governments and the RTPOs to designate a transportation system of statewide significance. The Washington Transportation Plan, adopted by the Transportation Commission, is the basis for the collaboration between the state and local governments and the RTPOs.

Another approach towards regional decision-making is the watershed basin planning process authorized by the 1998 Legislature. Counties and cities, with the involvement of state agencies and in cooperation with water utilities and the tribes, can exercise some of the authority previously exercised exclusively by the state. This may be a model for future relationships. However, it is new and not yet fully tested.

**Discussion**

**Types of Governmental Interests**

The Commission has found it useful to examine the interests of the different levels of government by separating those interests into three broad categories: (1) issues of only local concern; (2) issues of greater than local concern, i.e. regional or statewide; and (3) issues of solely statewide concern. Some issues may clearly fall into the solely local or solely state-wide categories. The majority of issues fall in the middle because they are of importance to both the local community and to the regional or state-wide interest.

**Coordinated Decision Making**

One alternative governance model that has received some recent attention might be called coordinated decision making.

In coordinated decision making, governments with decision making authority collaborate to reach a decision that each then ratifies. They also decide how to involve citizens, for example by allotting time at each meeting for public comment; appointing advisory committees or work groups; meeting with constituents between the joint sessions, or by providing additional seats “at the table.”

**Steps in Coordinated Decision Making**

The basic steps in coordinated decision making are:

- **Convening**, which includes initiation and organization of the process;
- **Substantive discussions**, during which the participants attempt to develop a proposed decision that addresses their interests;
- **Ratification**, when the representatives of each participating jurisdiction present the proposed decision to their governing bodies for approval;
- **Default decision making**, one option of which would be to establish a default decision making mechanism in the event the governments do not reach agreement. Any such mechanism would be for clearly defined types of issues; and
- **Implementation**, when the jurisdictions coordinate their actions to carry out the decision.
Principles Governing Coordinated Decision Making

The following are principles that should govern the development of a coordinated decision making process:

- There must be the ability to make a binding decision that closely involves the decision-makers;
- The decision-model should use existing governmental entities and authorities, supplemented, as appropriate, with additional jurisdictions;
- The decisions should be based on adequate information and findings;
- The process should be recognized as legitimate and provide an opportunity for public comment and appeal;
- There should be a compelling reason to act and invoke the decision-making model, including incentives – such as funding opportunities if jurisdictions collaborate and delegation of authority to the entities involved – and disincentives such as a default decision-maker;
- A clear, but minimal framework should be employed. It should not be complicated to use;
- It should have flexible operating rules so that it can be used in planning, regulatory, and permitting decisions;
- It should be equitable in its representation and decisions and provide mitigation benefits; and,
- It should have time certain deadlines.

Coordinated Decision Making For Project Decisions

Coordinated decision making can be used for specific projects either on an ad hoc basis or through procedures prescribed in a framework.

Ad hoc process

Most coordinated or collaborative decision making processes are currently established on an ad hoc basis. One party will suggest the idea and other parties decide whether to participate. If they do, they work to address the issues. Oregon and other states encourage such efforts by providing technical assistance for the convening process and by providing funds for facilitation services. Under this approach, the default decision making process, if parties do not reach agreement, are the existing processes, such as litigation or political action to change policy or leadership.

Pre-established framework

This model provides a structured framework for establishing a coordinated decision making process. As an example, the state or a county, or the governments of a region, would establish a framework that promotes negotiated decisions for a specific project or for a type of project, such as essential public facilities. The framework would specify how the coordinated decision making process would be convened, who has standing to participate, what issues are negotiable or nonnegotiable, and how decisions will be made if the participants cannot agree.
An example of this approach is a Wisconsin statute governing the siting of solid and hazardous waste facilities. Under that process, a local negotiation process is established when the applicant and the local government are unable to agree on siting. The statute controls the issues that may be considered and the procedure for negotiating disagreements. It also includes a procedure to resolve disputes that cannot be resolved through the negotiation process.

**Coordinated Decision Making for Rule or Policy Development**

Coordinated decision making can be used to develop rules or policies that apply either on a regional or statewide basis. The Administrative Procedures Act contemplates a form of coordinated decision making through its recognition of negotiated rule-making. Negotiated rule making is a process by which representatives of an agency and of the interests affected by a subject of rule-making seek to reach consensus on the terms of a proposed rule and on the process by which it is negotiated.6

Coordinated decision making for rule or policy development will generally require authorizing legislation. The legislation should enable one or more state agencies and local governments to develop and adopt a rule for regional purposes. It should specify the procedures for convening the process and a default decision process if an agreement is not reached.

The emphasis for policy development should be on those issues that are of greater than local concern. These are issues where there is value in establishing multi-jurisdictional agreements and regulatory authority to conserve and protect important state interests, including:

- Substantial health and safety issues;
- Essential public facilities and necessary, but unwanted, land-uses;
- Critical environmental and natural resources;
- Valuable energy resources; and
- Cross-jurisdictional impacts on ecosystem resources.

Watershed planning legislation enacted by the 1998 Legislature has many of the elements of this model. It allows a county to establish a watershed planning process that involves both local and state government and the tribes. The planning process is given authority to address a limited set of water resource issues. If agreement is reached on those issues, the agreement takes the place of rules that would otherwise be adopted by Ecology.

The watershed planning legislation was controversial, with a number of interest groups expressing concerns about or opposition to the proposal. The environmental community, the tribes, and others believe the watershed planning process is an untested model. They are concerned that these processes may result in a dilution of state standards. The tribes see the statute as essentially a delegation of state authority to local governments and are concerned with that result. Implementation of the watershed planning process will be watched closely by those interested in water

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Governance

quality and water quantity issues. It will take few years before there is sufficient information to judge the success of the program.

Options

Intergovernmental Coordinating Council

An Intergovernmental Coordinating Council could be established as a forum for developing a partnership between the different levels of government. It would bring together the interests of local, state, and tribal governments in a constructive discussion on how to advance the interests of Washington’s citizens as a whole. It would have representation from these different governments. The intergovernmental council could be given authority to establish broad policy over a specific set of land use and environmental issues. There would be a need to clearly define the authority of the council and the extent to which it would have the power, if any, to overturn decisions made by local governments or state agencies.

Pros:

- Proponents believe that a structured forum to create the partnership between governments will allow for creative solutions to issues facing the state and local communities. They believe it will provide an opportunity for the different governments to better understand each other’s issues and concerns.
- Proponents argue that an intergovernmental coordinating council with clear powers and duties will provide a stable process for resolving intergovernmental issues over time and as there are changes among elected officials.
- Those favoring this formal approach point out that it would replace an ad hoc system with one where there are clear lines of decision making authority.

Cons:

- Advocates for strong local control believe there is a risk that an entity such as this could become a super agency that would override local interests. They suggest that there should be continued reliance on local governments to make land use and environmental decisions.
- Some have noted that this is something that local governments and state agencies can do voluntarily. They do not believe there is a need to mandate coordination.

Regional Coordinated Decision Making Process

A framework for establishing coordinated decision making processes could be established as part of a consolidated land use code. The framework should be based on the principles discussed on page 17. The framework should allow the regional process to address either specific projects or specified policy or rule development. The framework should allow the use of an existing mechanism, such as an RTPO or an augmented county-wide planning process, or a new entity specifically designed to address the issue under review.

Pros:

- Proponents of regional decision making point out that many land use and environmental issues are important to both state and local and regional interests.
They argue that a decision-making process that allows all the parties to participate in the decision making process will result in a decision that is more likely to be acceptable and implementable.

- Proponents believe that a regional decision making approach will allow state-wide interests to be addressed while recognizing and dealing with the differences around the state.

  **Cons:**

- The environmental community fears that a regional decision making process may be used to reduce environmental protection to the lowest level that is acceptable. They argue that at a time when the state is facing ESA listings, there is a need for increased standards, not reduced ones.

- State and tribal interests are concerned that a significant number of regional decision making processes would stretch their resources to such an extent that they will not be able to participate in a meaningful way in all of the different processes.

**Alternative Dispute Resolution**

A key component of coordinated decision making is the provision of technical assistance to both state agencies and local governments to help establish and implement the process. A number of states have adopted more or less formal mechanisms to provide that assistance. Oregon, for example, has established an Office of Dispute Resolution that provides assistance in evaluating issues for their potential for resolution, identification of facilitators and mediators, and matching grants to help pay for the costs of the process. Further consideration should be given to how such an office can be established in Washington. Details should be further developed on its budget, duties, powers, and public role.

  **Pros:**

- An office of dispute resolution could provide a central repository of information about alternative dispute resolution. Establishing quality decision making processes and knowing when alternative dispute resolution is appropriate can eliminate lengthy court or legislative entanglements.

  **Cons:**

- Some in the business community have pointed out that there are already resources available to assist with alternative dispute resolution. They suggest that another state agency or office is not necessary.

**Recommendations**

(1) Establish new, or expand on existing, approaches to shared governance between state and local government. Two options deserving further consideration are:

  (a) An intergovernmental council with representation from state government, local government, and the tribes; and

  (b) Rule making and decision making procedures that promote shared governance over issues of greater than local concern, such as
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designation and protection of critical areas, shoreline management, and siting of transportation facilities of regional or state-wide significance.

(2) Provide additional technical assistance to state agencies and local governments on methods to avoid land use and environmental disputes and how and when to use alternative dispute resolution mechanisms. One mechanism deserving further consideration is a state office of dispute resolution to provide that technical assistance.
Chapter 8
Planning

Issue Statement

The GMA requires counties and cities to develop a comprehensive plan that is based on a community vision and looks forward for twenty years. There is no similar function at the state level. Individual state agencies may adopt strategic plans, but there is no integrating framework for them to use, other than the appropriation process and the capital budget.

The GMA was preceded by laws governing how local governments should adopt comprehensive plans and zoning regulations and how they should plan for the shorelines. There have been attempts to coordinate these different statutes, but differences remain.

Background

State Agency Coordination

Under the GMA, counties and cities are required to adopt comprehensive plans that provide a roadmap for the kind of communities they want to be. The plans are required to address a set of specific issues, and must include a plan for financing capital facilities. At the state level, there are comparable planning activities, but they are generally focussed on specific issue areas. For example, the Transportation Commission is responsible for developing the State Transportation Plan, which includes many similarities to a comprehensive plan. Other state agencies develop similar strategic plans, either as an effort to manage resources or set priorities, or to comply with statutory requirements.

What does not exist at the state level is an integrating document that brings the state’s goals and objectives together in a single place and sets forth strategies for achieving those objectives over time. The closest Washington State comes to a state plan are the operating and capital budgets passed every two years. Budgets are an expression of the Governor’s and the Legislature’s priorities. Unlike a comprehensive plan, however, the budgets have a time horizon of only two years.

One drawback of not having a comprehensive state plan is the difficulty in assuring that individual state agency actions are consistent with one another and do not work at cross purposes. This can lead to duplication of effort or to conflicts between agencies.

In the last few years, there have been some attempts to institute procedures designed to address some aspects this issue. Governor Lowry, by Executive Order, directed that interagency disagreements be brought to the director of the Office of Financial Management who was given the authority to resolve the dispute or to refer it to the Governor. Governor Lowry also encouraged the use of alternative dispute resolution mechanisms to resolve disputes between state agencies and between the state and other parties.
Governor Locke, through his creation of the Joint Natural Resources Cabinet has put in place another effort to develop consistent state policy and resolve differences among agencies. The State Salmon Strategy being developed by the Joint Cabinet is one example of the type of planning that can occur from such a coordinated process.

One difficulty facing the Governor in establishing this type of process is the existence of several separately elected state officials and agency heads appointed by independent boards or commissions. The Commissioner of Public Lands and the Superintendent of Public Instruction are elected agency heads. The Secretary of Transportation and the Director of Fish and Wildlife are appointed by commissions appointed by, but independent of, the Governor. The Governor cannot require these agencies to participate in a joint cabinet or to coordinate their activities with the other executive branch agencies headed by the Governor.

Planning Enabling Statutes

There are three separate planning enabling statutes. Each applies to a particular type of city or to counties. The planning enabling statutes provide the basic procedure and authority for counties and cities to engage in land use planning and adopt zoning and other development regulations. The planning enabling statutes date from the 1920s. Although they have undergone some changes, they are largely a result of thinking about planning from the early part of this century. In large part, the three statutes are the same, but they do have variations.

The GMA covers some of the ground covered by the planning enabling statutes, but it imposes some specific requirements on the nature of the planning and the goals to be considered. GMA jurisdictions must still rely on the planning enabling statutes for much of the process used to adopt their GMA comprehensive plans and development regulations.

Relationship Between the SMA and the GMA

The SMA was adopted by a vote of the people in the early 1970s. It establishes policies and goals for the shorelines of the state. The SMA includes statements of public policy concerning the importance of the shorelines to the state.

Cities and counties with shorelines subject to the SMA are required to adopt a shoreline master program, which includes a plan and implementing development regulations, to regulate activity and development on the shorelines. Ecology has authority to adopt guidelines for preparation of shoreline master programs and must approve all programs and amendments. A shoreline substantial development permit is required for certain kinds of development within the shorelines. Several elements of the shoreline program parallel requirements of the GMA. For example, both statutes provide for a land use element and for a transportation element.

One significant difference between the two statutes is that the SMA establishes a set of state goals and provides for priority uses for the shorelines. GMA, on the other hand, gives local governments the responsibility for balancing the goals of the GMA. A second significant difference is that the SMA gives to Ecology the authority to approve local government shoreline programs and allows appeals of shoreline permits to the Shoreline Hearings Board. Under the GMA, state agencies may

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7 Chapters 35.63, 35A.63, and 36.70 RCW.
comment on, but do not have approval authority over, local government decisions. Permit decisions are appealed to superior court, not to a state board.

The GMA includes specific direction to all cities and counties to designate and protect critical areas. These include wetlands, flood prone areas, and fish and wildlife habitat. Many of these critical areas are also included within the jurisdiction of the SMA.

The 1995 Legislature initiated the first step towards integrating the GMA and the SMA. It provided that the goals and policies of the SMA were also goals and policies of the GMA. It also directed that the Shoreline Master Program should be considered an element of GMA comprehensive plans. No direction was provided as to how the integration should be accomplished.

Discussion

State Agency Planning

The American Planning Association Growing Smart project has prepared a paper and suggested legislative guidance on state planning options. See, “Chapter 4 – State Planning”, Growing Smart Legislative Guidebook, American Planning Association (1995). The paper describes the following two paradigms for state planning:

Two general approaches in state planning have emerged and pose useful paradigms for drafting legislation .... One has been called the “civic model” and is derived from the heritage and assumptions of city planning. The second has been termed the “management model” and draws its orientation and techniques from the science of organization management. Under the civic model, the state would engage in a goal-setting process, develop an inventory of resources and an appraisal of existing conditions that affect the ability to achieve those goals, identify a set of alternative actions, and compile a list of implementing measures. The civic model would produce plans affecting land use and critical areas management or addressing functional topics like transportation, water, and economic development. The plans would have regulatory impact and/or affect the programming of infrastructure to support particular growth strategies.

While the purpose of the civic model is to identify public goals and large-scale policy choices that will shape the state’s future, the purpose of the management model is to ensure that state agencies operate in an efficient and coordinated manner consistent with the priorities of the chief executive. Under the management model, the governor, who is the state’s chief executive, implements policies and measures enacted by the state legislature and uses the planning system to exert administrative control over state agencies by establishing operational guidelines and directions for them.

Growing Smart Legislative Guidebook, pp. 4-9 to 4-11.

There are a number of approaches for coordinating state agency responsibilities. The following is a list adapted from the Growing Smart project of some options that provide mechanisms for coordinating agency duties:
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- State agency cabinet – A cabinet of state agencies is formalized and has authority to adopt rules. Many states, including Washington, have a Governor’s cabinet. In Washington, the cabinet does not have independent rule-making authority. A formalized cabinet brings together key departments whose activities have an impact on planning and land use, enabling a governor to speak with a single voice on critical growth and development issues in the state. A secondary purpose of the cabinet is to resolve disputes among state departments on the siting of state and regional public facilities.

- State planning office – A state planning office is established in the office of the governor. Its primary activity would be to advise the governor on policy initiatives and coordinate activities of various state agencies. This is a function that is currently served in part by the Office of Financial Management.

- State planning commission – Where a state does not have a strong tradition of statewide planning and requires an independent body to initiate and gain support for a new program, a state planning commission is a helpful mechanism. Moreover, because the commission will continue through different administrations, it can establish a presence and continuity for planning in the state.

Any of these state options will no doubt be met with diverse views. Some view more state planning as a necessary component of a consolidated land use code. Others view local governments as the best entity to conduct planning and see state planning as a way to wrest control away from local governments.

Planning Enabling Statutes

Over the last several years, the statutory recognition for different classes of cities and counties has been changed and many of the previous distinctions have been eliminated. In some issue areas, distinctions between cities and counties no longer have value. The planning enabling statutes fall into this category.

The planning enabling statutes preceded the GMA and provided procedures for adoption of comprehensive plans and development regulations. The GMA did not fully address the overlap and left the relationship between the two statutes unclear, causing occasional confusion over which statute applies and for what purposes. The different procedural requirements make it more difficult for members of the public to participate in related county and city planning processes. In addition, there has been at least one superior court decision requiring a county to readopt a portion of its comprehensive plan because it did not comply with the procedural requirements of both the GMA and the planning enabling act.

GMA and SMA Planning

The GMA and the SMA have procedural requirements that make it difficult for GMA jurisdictions to fully integrate their GMA and SMA plans and development regulations.

SMA requires a local government to adopt changes to its shoreline master program within two years after Ecology updates the shoreline guidelines authorized under the SMA. The GMA limits changes to GMA comprehensive plans to once each year. It also requires counties and cities to evaluate their plans’ consistency with the GMA goals at least once every five years. There is a potential that these different review
cycles will not fit together, forcing local governments to continually modify their plans to remain consistent with state law.

The SMA also provides for an extensive public involvement process that a local government must follow to adopt a shoreline master program. The GMA also makes public involvement a critical component of the GMA planning process, but does not prescribe the details of the public process. Although there is no direct inconsistency, some local governments may have developed public involvement mechanisms under the GMA that work within their community but do not meet the specific requirements of the GMA.

A significant component of the SMA is Ecology’s authority to approve shoreline master programs and any amendments before they take effect. Under the SMA, the local government submits its adopted master program to Ecology for approval. There are no time limits on Ecology’s review. Under the GMA, state agencies do not have approval authority, but do have the right to review and comment. State agencies review and comment on the local government’s draft plan, not on its adopted plan. Combined with the GMA’s prohibition on amending comprehensive plans no more than once each year, this presents logistical problems for local governments trying to comply with both statutes.

If local governments could use the GMA public participation processes and synchronize the comment period on the GMA comprehensive plan with Ecology’s review of the shoreline master program, then integration of the two statutes could be facilitated without lessening the level of state oversight currently found in the SMA.

**Options**

**State Planning**

**Status Quo**

Make no changes to existing cabinet structures.

*Pros:*

- Proponents of the status quo note that the Governor has authority to organize his cabinet in whatever manner he or she deems best. Although the goal of state planning is a good one that should be encouraged, they believe that it is the Governor’s responsibility and not that of the Legislature.

*Cons:*

- Those who favor some changes recognize that the Governor has the ability to organize the cabinet in a variety of ways. They see a benefit in institutionalizing a state planning function so that it will be in place over time and allow for long range planning.

**Cabinet Coordinating Committee**

A cabinet coordinating committee could be established. It would consist of agencies with an impact on land use and environmental issues, including the natural resource agencies and agencies concerned with education, health, social services, transportation, and economic development. The cabinet coordinating committee could also oversee and coordinate existing state planning functions. The cabinet coordinating committee would also work to coordinate state agency actions and
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resolve differences between agencies. It could also serve to establish state policy on issues arising through local or regional decision making processes and provide state input into those processes.

Pros:

• Proponents note that the budget process is the only existing formal mechanism for developing state policy in a comprehensive manner. They believe the budget process has too short of a time horizon for effective planning and that it is not designed to address inter-agency issues.

• Proponents note that several important state agencies are headed either by separately elected officials or by a board or commission only indirectly accountable to the Governor. Legislation could address this situation.

• Proponents note that establishing a cabinet coordinating committee through legislation will also assure continuity from one administration to another. They also suggest that the process of setting state policy could be opened to greater public involvement and input.

Cons:

• Some believe that legislation mandating a specific cabinet structure would be an intrusion of the Legislature into a matter that should be left to the Governor and other elected officials to resolve.

• Some in the environmental community are concerned that environmental protection will lose out to other state-wide interests and result in a lessening of environmental protection.

Integrate the Planning Enabling Statutes and Coordinate with the GMA

The three separate planning enabling statutes would be combined into a single statute that applies to all cities and counties. This would eliminate procedural inconsistencies between the different statutes and further the goal of consolidating the different land use statutes. The objective would be to retain for local governments the maximum flexibility to design local processes consistent with overall state-wide objectives to assure a fair and open public process. There would be no expansion of GMA requirements to non-GMA planning jurisdictions.

Pros:

• Proponents note that the differences between the planning enabling statutes cause confusion and do not have significant benefits. They suggest this option would provide an opportunity to modernize the planning statutes and would also allow the procedures for developing and adopting comprehensive plans and development regulations under the planning enabling statutes to be synchronized with the GMA.

Cons:

• Some city officials have expressed concerns. They do not believe there are any significant problems with the existing statutes. They suggest needed changes should be made to the individual statutes.
• Cities are also concerned that the proposal could require county and city governments to make substantial changes to their zoning codes, creating opportunities for appeals and challenges to those codes.

**SMA and GMA Integration**

**Status Quo**

Leave the current procedures in place.

*Pros:*

• Some argue that local governments already are able to integrate their shoreline master programs and GMA comprehensive plans if they wish.

• Some in the environmental community point out that the current procedures assure that careful attention is given to protecting the shorelines, which are a unique and limited resource. They do not want to see this protection diminished.

*Cons:*

• Some local governments believe that the 1995 changes incorporating the SMA into the GMA left many unresolved issues about how the two statutes interact. They would like to see these issues addressed.

• Some cities and counties have noted that the processes for adopting plans under the two statutes create difficulties because of their different timelines and procedures. They would like to have a uniform procedure in place.

**Changes to the Procedures for Adopting Shoreline Master Programs**

The SMA would be amended to allow a GMA jurisdiction to make changes to its shoreline master program (SMP) following the procedures specified in the GMA. A local government could integrate its SMP into its GMA plan, so long as the local government identifies the components of the GMA plan that meet SMA requirements. Ecology review and approval would still be required for the SMP, but would be timed to fit within the GMA comment cycle.

*Pros:*

• Proponents argue that this change will allow local governments to better integrate their shoreline plans with their GMA comprehensive plans. They note that it maintains the state interest in the shorelines by retaining Ecology authority to review and approve the shoreline plans.

• Proponents argue that this is a step towards further consolidation and allows time for implementation and assessment of these procedural changes, before substantive changes are considered.

*Cons:*

• Some in the business community believe that this approach amounts only to minor changes to the planning system when what is required is a more substantial integration of shoreline planning with the GMA.

• Some in the environmental community are concerned that the integration of the SMA plans into GMA plans will make it more difficult for the public to verify that a county or city is complying with the SMA and its more stringent requirements.
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- Some local control advocates view this as an expansion of Ecology authority into the GMA that they believe is inappropriate.

Fully integrate SMA into the GMA

The shoreline element would be adopted pursuant to same procedures as other elements of a GMA comprehensive plan. Ecology would review the shoreline element in the same manner as other GMA comprehensive plan elements are reviewed. It would not have approval authority as it now does. Ecology would appeal a shoreline element it believes does not comply with the SMA.

Pros:

- Some in the business community believe this option would be consistent with legislative direction that the GMA should be considered the main planning statute. They believe that incorporating the relevant provisions from the SMA into the GMA will assure that the shorelines are protected while also creating a more efficient system.

- Others believe that local governments are in the best position to understand and manage the resources in their jurisdiction and that they should be given the authority to manage those resources.

Cons:

- Environmental and tribal interests argue that the shorelines are a unique resource that belong to the people of the state as a whole, not to any single jurisdiction. They see state oversight as being essential to ensure that the public's interest in the state's shorelines does not become overwhelmed by the more narrow local interest of a city or county.

- Some also believe the SMA should be retained as is and should not be integrated into the GMA.

- Environmental community and tribal representatives point out that the SMA applies to more than land development and that the GMA does not have the framework necessary to replace those functions.

Recommendations

(1) Establish a process to better coordinate state agency planning and activities and resolve interagency disputes.

(2) Integrate city and county planning enabling statutes into a single, uniform planning enabling statute applicable to all cities and counties. Coordinate the provisions of the planning enabling statute to remove procedural inconsistencies with the Growth Management Act.

(3) Clarify the procedures for adopting shoreline management programs so that shoreline programs may be more easily integrated into the process for adopting GMA comprehensive plans and development regulations. For example, coordinate the time period for Ecology review of the shoreline master program with the time period for state review and comment on a draft GMA comprehensive plan.
Chapter 9
Environmental Review and Permitting

Issue Statement

Since the adoption of SEPA in 1972, Washington has required environmental review as a part of the project review process. The adoption of the GMA presents an opportunity to better address certain cumulative impacts of land use decisions when plans are adopted than is currently available through the project review process. Although cumulative impacts are best addressed at the planning stage, this does not mean there should be no consideration of them during project review. In addition, the timing of environmental review presents questions that need resolution.

Over the last few years, increasing attention has been paid to the issue of integrating different local and state governments permits into a single permit through a single process. 1995 Legislation created the Permit Assistance Center and a coordinated permitting process focussed on state permits. This legislation is due to expire in 1999.

The siting of essential public facilities has posed difficulties for local governments, the state, and the public. The GMA provides minimal direction and does not address issues related to regional concerns and impacts. More recently, issues surrounding the siting of group homes, correctional institutions, and related facilities have increased in importance.

Background

State Environmental Policy Act

SEPA was adopted in the early 1970s, in part to ensure that government officials were aware of the impacts of their decisions. In the twenty-five years since its adoption, SEPA has become a fundamental part of this state’s system for reviewing the environmental impacts of nearly every type of governmental action, from the adoption of city and county ordinances, to the decision to build a sewage treatment plant or a state highway, to the approval of an application to construct a building.

In the intervening twenty-five years, a number of laws addressing specific environmental issues have also been adopted. These include issues such as the protection of the shorelines, air quality, hazardous waste control, solid waste control, and water quality. Some of these laws have resulted from federal requirements, others have been locally driven. In the early 1980s, the Legislature initiated a comprehensive review of SEPA that led to legislative changes adopted in 1983.

In 1990, the first stage of the Growth Management Act (GMA) was adopted, followed by additional provisions in 1991. As cities and counties have begun to implement the GMA, there have been efforts to evaluate the extent to which these different statutes have resulted in duplication. In 1993, Governor Lowry appointed the Governor’s Task Force on Regulatory Reform, in part to address the project review process. The Task Force proposed legislation that was ultimately adopted by the
Environmental Review and Permitting

1995 Legislature as ESHB 1724. That measure included provisions designed to partially integrate SEPA and GMA.

SEPA requires a governmental entity, whether state or local, to analyze the environmental impacts of its major actions. The same basic rules apply whether the proposed action is general in nature – e.g. adopting an ordinance – or project specific. The Department of Ecology has adopted rules to implement SEPA.

The lead agency must make a threshold determination of whether the proposal has probable significant adverse environmental impacts. If the lead agency determines that it does, an Environmental Impact Statement (EIS) must be prepared.

An agency’s decisions under SEPA are subject to review administratively, if allowed by the agency, and judicially.

ESHB 1724 included provisions directing that certain land use decisions made in GMA comprehensive plans and development regulations not be reconsidered during project review. These include decisions concerning the type of land use, density of residential development in an urban growth area, and the availability and adequacy of public facilities identified in the comprehensive plan. In addition, a city or county planning under the GMA may determine that SEPA’s requirements for the analysis of and mitigation for the specific adverse environmental impacts of a project action have been adequately addressed in the jurisdiction’s comprehensive plan and development regulations.

Local Government Permit Process

ESHB 1724 established a set of standards for local government permit processes. Although prior law had contained some restrictions on the number and type of local hearings that could be held on a project, ESHB 1724 established strict requirements. In addition, on a trial basis, it required permit decisions to be made within 120 days after an application has been submitted. The 120 day period excludes a number of events, including the time required to prepare an EIS. The trial was originally for three years. It was extended for two additional years in 1998.

ESHB 1724 did not impose any specific requirements on the procedure for conducting local hearings. As with prior law, local governments have discretion on how to structure those hearings, within the basic requirements of due process.

State and local permit coordination and integration

ESHB 1724 added the Permit Coordination Procedures Act and created the Permit Assistance Center in Ecology. The Permit Assistance Center was placed under sunset review and is due to expire in 1999. The Joint Legislative Audit and Review Committee concluded its review has recommended that the Center be reauthorized. In addition, the Joint Legislative Rural Economic Development Task Force has been considering the role of the Permit Assistance Center in addressing economic development issues in the rural areas.

In the early 1970s, the Environmental Coordination Procedures Act was enacted by legislature. After some initial interest, that law fell into disuse and was repealed by ESHB 1724. The replacement statute, the Permit Coordination Procedures Act, provides a combination of information sharing and permit coordination. The later

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8 RCW 36.70A.030.
takes place only at the request of an applicant. The process includes the appointment of a project facilitator to work toward ensuring that timelines agreed to by the parties are met. The process provides for the coordination of state permits. A local government may be invited to participate in the process, but may not be required to do so. The act sunsets in 1999.

Discussion

Environmental Review

Non-project vs. Project Environmental Review

Although SEPA and its implementing rules distinguish between the environmental review conducted for projects from that required for legislative and other non-project actions, the standards for conducting non-project environmental review are not clear and may not be meaningful. For example, the alternatives analysis required for an EIS, which requires a review of the no-action alternative, may not make sense in cases where an agency is required by law to take some action. The alternative of not adopting a comprehensive plan is not an option that a local government required to plan under the GMA can realistically consider.

The existing SEPA process for environmental review of non-project actions — actions such as the enactment and amendment of comprehensive plans and development regulations — is not always conducive to good environmental review. The existing process can discourage or thwart good environmental review. The only environmental document prepared for most legislative enactments is a SEPA checklist. This checklist usually is prepared after the proposed legislation has been written. The county or city prepares and reviews the checklist to determine whether the adverse environmental impacts disclosed in it are “significant” within the meaning of SEPA. Counties and cities have an incentive not to find impacts “significant” because when they do they must prepare an expensive and time-consuming EIS. If impacts are determined not to be “significant” in the SEPA sense, then no further environmental review beyond the checklist is performed. However, even “nonsignificant” plans or regulations often have environmental consequences and entail environmental tradeoffs that ought to be acknowledged and understood by the policy-makers considering their adoption and the citizens whose conduct will be regulated.

Many cities and counties issued determinations of nonsignificance before enacting their GMA-required plans and regulations. These negative threshold determinations may well have been appropriate under existing law, especially in jurisdictions that were simply amending their existing plans and regulations. The quality of the plans and regulations would have been improved, however, if some environmental review had accompanied the development, drafting, and enactment of these plans or regulations. SEPA should encourage environmental review that is tailored in scope to the potential impacts of the plan or regulation being enacted, and such environmental review should occur while the plan or regulation is being developed, not performed as an after-the-fact justification for decisions that already have been made.
Threshold determinations and Environmental Impact Statements
The SEPA threshold determination process divides project actions into the few that require EISs and the many that do not. The great majority of projects receive determinations of nonsignificance (DNSs) or mitigated determinations of nonsignificance (MDNSs). The amount and quality of the environmental review that these projects receive varies from project to project and jurisdiction to jurisdiction because SEPA does not provide a meaningful standard for determining significance or a clear and consistent process for evaluating impacts that are not deemed significant. In addition, SEPA does not provide clear direction on the use a city or county should make of existing environmental documents that have been prepared for other projects or for non-project actions such as the adoption of a sub-area plan. There is general agreement that, during project review, the SEPA process ought to focus on whether the impacts of a project have been identified and studied to the extent appropriate given the nature and extent of those impacts. In the view of some, the present threshold determination process distracts from that determination and leads to confusion, duplication of effort, procedural gamesmanship, and unnecessary delay. For others, the threshold determination is an important step in the project review process that ensures the public has notice of project impacts and that environmental concerns are addressed.

Reliance on GMA Policy Decisions
ESHB 1724 allowed a GMA jurisdiction, during project review, to rely on its plans and regulations that have adequately addressed environmental impacts. However, the process is sufficiently uncertain that it has not been used often.

One reason suggested for this lack of use is that little guidance has been provided to cities and counties to assist them in conducting the environmental analysis on a comprehensive plan. Because of the uncertainties involved, and because of the expense, few cities or counties have undertaken the effort.

Multiple Regulatory Requirements
In addition to requirements under GMA to designate and protect critical areas, the state and cities and counties implement a number of other state and federal requirements designed to protect the environment. These include provisions to manage and protect the shorelines, regulate stormwater, and protect streams and wetlands. In some instances, although not in all, the requirements have been adopted after thorough environmental review.

During project review, a project proponent may be required to study pursuant to SEPA impacts of the project that are regulated by other development regulations, even though those regulations may have been designed to address those impacts and provide for mitigation. The business community believes this duplication is unnecessary and should be eliminated. It suggests that SEPA review may not be necessary for those impacts already addressed by development standards. The environmental community suggests that this issue can be resolved through consistent implementation of existing laws, including ESHB 1724.

Local government permit process
The requirement that counties and cities make a decision on a project application within 120 days is viewed as a mixed success by participants in the land use permitting process. Applicants generally view the statute as too flexible. They do
not believe that the time periods are certain enough. Members of the public view the provisions as creating a process that moves too quickly and does not allow enough time for the public to review proposals and participate in the decision making process in a meaningful manner. Local government officials express concern about the paperwork involved.9

The 120-day time limit was enacted as a three-year pilot project in 1995 and was due to expire on June 30, 1998. The Commission, directed to study the 120 day time limit and its impact, reported to the Governor and the Legislature in 1997. The report concluded that not enough time had elapsed to truly evaluate the effect of the requirement. It recommended that the sunset date should be extended to June 30, 2000 to allow time for additional study of the impacts of the program. The Legislature enacted the Commission’s recommendation during the 1998 session. The Commission also noted that an additional study would need to be funded and assigned to a state agency or other organization. That has not occurred.

State and local permit coordination and integration

The Coordinated Permit Process is underutilized despite its significant potential. First, applicants are often not familiar with the process, and are unaware of its value in managing multiple permits, time schedules, hearings, and appeals. Second, although many of the permits for projects are the responsibility of local agencies, local agencies are not required to participate in the process.

The major value of the Coordinated Permit Process is the “internal coordinator” feature. The coordinator serves as the main point of contact for the permit applicant and manages procedural aspects of the process. The coordinator assures that the applicant has sufficient information to apply for multiple permits, coordinates the review of those permits by the participating permit agencies, ensures that timely decisions are made, and assists in resolving any conflict or inconsistency among project permit requirements and conditions.

The Coordinated Permit Process is approximately three years old. The process has led to cooperative review of four projects, and one has completed permitting. With more experience, the process may be suitable for mandatory application to certain classes of high impact, multi-jurisdictional projects.

One downside of the Coordinated Permit Process may be its formality. The formal commitment to timelines can cause reluctance on the part of both the applicant and the agencies to sign the agreement until they are sure they can meet the agreed to commitments. While this may not prevent the permitting processes from moving forward, the negotiation can occupy many hours of governmental and private sector staff time.

Options

Threshold Determinations, SEPA, and GMA Integration

The Commission established an advisory committee to consider revisions to SEPA and GMA as a way to better integrate the two statutes. The advisory committee developed an outline of a proposal for the Commission’s review. The proposal

9 See, Permit Monitoring Case Study Report, Report to the Land Use Study Commission, David Evans and Associates (August 1997).
would have replaced the SEPA threshold determination with a different procedure to evaluate environmental impacts. The procedure would rely on a revised environmental checklist identifying probable impacts. The lead agency would make a preliminary determination listing the probable impacts and identifying existing documents, regulations, and processes that apply to the proposal. The lead agency would issue the preliminary determination at the same time as the notice of application. Public comment would be solicited. The final determination would identify those impacts that are not significant, those that have already been analyzed and addressed by other documents or regulations, and those that require further study under SEPA. An environmental report would be prepared on those impacts needing further study under SEPA. When the report is completed, the lead agency would issue its decision on the merits and decide what conditions and mitigation should be imposed. The application could be denied if the adverse impacts cannot be mitigated. The applicant would be able to appeal a determination that requires additional studies. Other parties could appeal SEPA issues at the same time as the appeal on the underlying governmental action.

Pros:

- Proponents note that the SEPA threshold determination process divides project actions into the few that require Environmental Impact Statements and the many that do not. They point out that the great majority of projects receive DNSs or MDNSs and suggest that this makes the threshold determination meaningless in many cases.

- Proponents argue that the amount and quality of the environmental review that projects receive varies from project to project and jurisdiction to jurisdiction, because SEPA does not provide a meaningful standard for determining significance or a clear and consistent process for evaluating impacts that are not deemed significant.

- Proponents point out that SEPA does not provide clear direction on how a city or county should use existing environmental documents that have been prepared for other projects or for non-project actions. They believe this proposal will address that situation.

- Proponents believe that SEPA ought to focus on whether the impacts of a project have been identified and studied to the extent appropriate given the nature and extent of those impacts. They believe that the present threshold determination process distracts from that determination and leads to confusion, duplication of effort, procedural gamesmanship, and unnecessary delay.

Cons:

- The environmental community believes that existing law already provides all the authority and direction that is needed for local governments to rely on decisions made through comprehensive plans and development regulations during project review.

- Home builders and other developers are concerned that this proposal could raise the cost of permitting for small projects and will lead to even higher housing prices.

- Local governments say they have not yet caught up with the changes made to SEPA in 1995. They suggest more training and technical assistance should be
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provided to assist local governments in dealing with those changes before making more changes.

- The environmental community and tribes note that SEPA applies to a wide range of actions that extend beyond the GMA. They believe the proposal may exclude these other actions from environmental review. They say this will either result in two different environmental review processes, one for GMA actions and another for everything else, or will eliminate environmental review for all of those other actions. They note that one benefit of SEPA as it currently exists is that it provides a relatively consistent process for environmental review no matter what type of decision is being considered.

- Members of the environmental community fear the proposal will result in less environmental review. They say that when the state is facing potential salmon listings under the ESA, this is the wrong direction. They believe there is a need for more environmental review, not less.

The Commission has concluded that eliminating the threshold determination process as proposed should not be recommended. Although the goal of better environmental review and analysis was supported, the negatives were outweighed by the benefits at this time. However, this may be an idea that deserves additional review and consideration in the future.

Environmental Review of Non-Project Actions

Amend SEPA to distinguish between the type of environmental review conducted on non-project actions from that conducted on project actions. Environmental review of non-project actions could specifically include the need to look at cumulative impacts of proposals. Specific guidance for conducting environmental review of comprehensive plans and development regulations could be provided to increase the quality of environmental review and make it more likely that projects consistent with the comprehensive plan and development regulations would have had most of their impacts adequately analyzed and addressed.

Pros:

- Proponents suggest that the quality of environmental review of non-project actions, including the analysis of alternatives, should be improved and made more consistent, so that legislative bodies and citizens alike understand the environmental tradeoffs inherent in legislative choices and so that the environmental consequences of such choices do not need to be studied again at the project level.

- Proponents note that the legislative decisions embodied in plans and regulations have environmental consequences and entail environmental tradeoffs that ought to be identified and considered by the policy-makers who adopt such plans and regulations.

- If a local government wants to prepare an EIS before the adoption of a comprehensive plan or development regulation, proponents argue that the current SEPA rules provide little guidance on the content of such a non-project EIS.
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Cons:

- Those expressing concern about this option believe that it is premised on the belief that with enough environmental review of a comprehensive plan and development regulations, individual projects will need little or no environmental review because the fundamental choices and tradeoffs were made during planning. However, those who express concern about this approach believe that the tradeoffs frequently are not analyzed during planning. They believe that some environmental review will be needed on most projects to be certain that their impacts have in fact been analyzed and addressed. They also express concern that the analysis of impacts in the abstract at the planning state cannot anticipate all of the impacts that will be present when the plan or regulation is applied to specific property.

- Local governments point out that to make this approach work, funding will be necessary to allow them to conduct the required review on the comprehensive plan and development regulations.

Permit Coordination and Consolidation

Reauthorize the Environmental Permit Assistance Act — Chapter 90.60 RCW.

The Permit Assistance Center and its powers and duties, including the Coordinated Permit Process, will be terminated June 30, 1999, as provided in RCW 43.131.388. The Permit Assistance Center and the Coordinated Permit Process should be extended and expanded to encourage local agency participation. In addition there should be specific, ongoing evaluation of whether to create a mandatory coordinated process for classes of high impact projects. This ongoing evaluation should consider whether there should be an impact threshold for mandatory inclusion in the process together with appropriate exemptions.

Pros:

- Proponents argue that even though the coordinated permit process has not had extensive use, the Permit Assistance Center has been an important resource of information. They point out that the Center has received generally positive ratings from those who have used its services.

- Proponents note that one of the difficulties in using the existing coordinated process is that it only applies to state permits. They suggest that in order to make the process more useful, local permits should be included.

- Proponents suggest that for projects with significant impacts, and significant coordination issues, it may make sense to require the use of the coordinated permit process. They believe this question deserves further study.

Cons:

- Some in the business community have noted that the Permit Assistance Center is currently being reviewed by the legislature under the sunset review process. In addition, the Joint Legislative Task Force on Rural Economic Development is looking at the Permit Assistance Center. They suggest that these processes should be allowed to run their course without Commission interference.
Additional Changes for Consideration

A number of additional improvements to the permit assistance center and the coordinated permit process should be considered. These include:

- The cost recovery section in the Environmental Permit Assistance Act (RCW 90.60.100) could be expanded to allow, by mutual agreement of the parties, other agencies to recover or accept cost-reimbursement. The statute currently allows only the coordinating permit agency to recover costs of performing coordinated permit services.

- There might be value in encouraging a combined appeals and hearings process for appeals of permits within the Coordinated Permit Process. Hearings can now be combined for those permits which are under the appellate jurisdiction of boards within the Environmental Hearings Office. Legislative direction to further encourage consolidation might be considered.

- The Permit Assistance Center should continue to reexamine and improve the mechanics of the Coordinated Permit Process scheduling agreement and move towards developing consolidated permit processes.

- The Permit Assistance Center should continue to use multi-agency permit coordination teams to help streamline the permitting process for projects that do not need the formality of the Coordinated Permit Process. It should also work with entities such as ports, economic development councils, and similar organizations to make its services known.

- There should be a review of whether regional permit assistance centers should be established to provide more locally based services.

- A pilot project should be considered to test a consolidated permit process. It should focus on specific projects and involve local governments and state agencies. As a starting point, two projects, one West and one East of the Cascades, could be identified. Funding for the pilot might be necessary.

- There should be an exploration of additional methods of obtaining federal, tribal and local consistency and participation in the coordinated permit process. Where necessary and appropriate, sufficient funding needs to be provided to enable jurisdictions to pay for or recover the costs of permit coordination and consolidation.

**Pros:**

- Proponents note that the current scope of responsibility for the permit assistance center is extremely limited. They believe these options may provide some opportunities to extend the use of the permit assistance center as well as expanding the process to include permit consolidation and integration as well as permit coordination.

**Cons:**

- Some have noted that the options do not provide sufficient detail on which to gauge whether they make sense. These commentators suggest the options need more review and consideration first.
Recommendations

(1) Environmental Review.
   (a) Provide procedural and substantive guidance for the environmental review of comprehensive plans and development regulations to ensure that cumulative environmental impacts of plan decisions and subsequent implementation are analyzed and addressed.
   (b) Consider whether additional changes should be made to the environmental review process to ensure that decisions made as part of the adoption of a comprehensive plan and development regulations, that have been subject to environmental review, are not subject to duplicative review during the project review.

(2) Local Project Review. Establish optional minimum standards for local government administrative hearings in order to make the local government process more thorough and consistent. This is seen as a necessary prerequisite to further consideration of having shoreline permit appeals heard on the record rather than de novo.

(3) 120-day Project Review Time Limit. Designate an entity to study the impacts of the 120-day project review time limit in order to make a recommendation to the legislature and the governor prior to June 30, 2000. The 120-day time limit, originally due to expire in 1998, was extended for two years. The study should examine, among other issues, whether local governments are meeting the timelines, whether the timelines should be modified to recognize the complexity of projects, and whether sanctions for failure to meet the deadlines would be appropriate.

(4) Coordinated State Permit Process.
   (a) Extend the permit assistance center.
   (b) Consider a pilot project for the integration of state permit requirements into a single permit, such as consolidating Joint Aquatic Resource Permit Application (JARPA) permits into a single permit. The idea of a consolidated state and local permit should also be considered through an appropriate pilot program.

(5) Funding. Develop a consolidated land use code approach that provides sufficient funding to perform adequate environmental review at the planning stage, in order to reduce duplicative environmental review at the project review stage.

(6) SEPA. Further consideration should be given to resolving the key issues that divide stakeholders over the future of SEPA. Some of the issues that deserve further consideration are:
   - The environmental community and the Commission's tribal representative cite SEPA as a cornerstone of environmental protection in our state. At a time when salmon recovery is on the top of the state agenda, they argue that now is not the time to weaken environmental protection. They refer to circumstances where GMA plans had little or no environmental review, thus requiring such information at the project stage to adequately analyze the
environmental impacts of projects. They also point out that cumulative environmental impacts of development are not handled well under the current system, but that project review is the place where it is most likely to occur. They also note that SEPA applies to more than project development and GMA planning, because it applies to all government “action”.

- The business community believes regulatory reform and GMA promised more certainty in the permit process, but in reality that predictability has not occurred. In their view, SEPA and the duplicative layers of process are still used as a tool to slow down projects, which adds to the problem of affordable housing in our region.

- Local governments cite the lack of available funds to do detailed and comprehensive environmental review at the planning stage. They also indicate that many times property owners are either unsure of development plans or are unwilling to share such plans at the planning stage; thus, environmental review cannot always predict accurately what will actually be built.

A resolution of these issues will need further careful deliberation and consensus building. The dialogue should continue. After the salmon recovery plan is in place, and further GMA plans are in place, it is possible the context will be different. Adequate funding of environmental review will be necessary at the plan stage to implement any reforms.
Chapter 10
Essential Public Facility Siting

Issue Statement

Essential public facility siting in Washington involves a complex array of interests and social policy. The GMA, which directs cities and counties to establish a process for siting essential public facilities, also prohibits them from precluding the siting of those facilities. The GMA definition of essential public facilities is broad and ambiguous. It includes facilities owned and operated by governmental agencies as well as facilities owned and operated by private entities. The current procedures do not provide guidance for addressing the impacts of essential public facilities on the host communities.

Background

Pre-GMA

The traditional power of local government to control land uses within their jurisdiction is in the Washington Constitution, Article XI, Section 11. A county, city, town, or township may “make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” Under pre-GMA zoning laws, there was little specific legislative guidance regarding the siting of most essential public facilities. Disputes over siting were decided on a case by case basis.

State Siting Processes

State law does provide for the siting of certain types of large facilities. The Energy Facilities Siting Evaluation Council (EFSEC), originally established in 1970, has authority to site large energy facilities, such as nuclear power plants, oil pipelines, and some electrical transmission facilities. EFSEC preempts all state and local permit processes for those facilities over which it has authority. The siting of hazardous waste management facilities is also regulated by state law. The state has preempted the field for siting some types of hazardous waste management facilities, but does provide a mechanism for a community and a facility proponent to reach an agreement that becomes a part of the state’s regulations.

GMA

The GMA attempted to address essential public facilities siting issues. It defines essential public facilities to include

those facilities that are typically difficult to site, such as airports, state education facilities, and state or regional transportation facilities, state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, and group homes.

10 Chapter 80.50 RCW.
11 See RCW 70.105.200 through 70.105.260.
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RCW 36.70A.020.
These facilities, while needed by society, often have real or perceived negative impacts on surrounding communities that may make them undesirable neighbors, and increase the complexity and difficulty of siting new facilities or expanding existing facilities. The GMA requires all local comprehensive plans to include a process for identifying and siting essential public facilities, and prohibits local comprehensive plans or development regulations from precluding the siting of essential public facilities. It requires the state Office of Financial Management to maintain a list of essential state public facilities. State agencies must comply with local comprehensive plans and development regulations.12

In addition to these siting provisions, the GMA requires county-wide planning policies to include policies for siting public capital facilities of a county-wide or state-wide nature.13

The Department of Community, Trade and Economic Development (DCTED) adopted procedural criteria to guide local governments in the implementation of GMA, including the siting of essential public facilities, but these procedural criteria are not mandatory nor do they address all of the issues that have arisen over the siting of essential public facilities.

Discussion

While the Growth Management Act established a process for the siting of essential public facilities under the local comprehensive planning process, this bottom-up process does not always work for statewide or regional facilities, especially those sited by state agencies. Specific issues include:

• The process of identifying and siting these facilities is defined as a local responsibility under the Growth Management Act, while these facilities are often owned and provided by state or regional agencies or private companies. The role of these facility owners in identifying needs and in siting is unclear.

• The definition of an essential public facility in the legislation is vague. For example, "state and regional transportation facilities" are listed. Does this include all state-owned transportation facilities? What is a regional transportation facility? Does this include facilities not owned by the state, but which are of state-wide significance?

• The status of the OFM list of essential state public facilities is not clear. The legislation indicates that this is a short-term list. In practice, OFM has used the 10 year capital budget as the list. A longer term list seems to be needed to better integrate into local land use plans, but state agencies vary in their authority to develop long term plans. Is the list meant to be of generic types of facilities – i.e. interstate highways, branch campuses, etc. – or only specific improvement needs – i.e. widening I-405 from point a to point b, a UW building expansion, etc? What process should be used to determine the need for a facility on the list? Should all state capital projects be classified as essential?

12 RCW 36.70A.103.
13 RCW 36.70A.210.
The legislation is silent on any details of the siting process. Should mitigation be part of the siting process for essential public facilities? Should mitigation be a totally local decision?

At what point do local government siting requirements effectively preclude development or expansion of an essential public facility? Does "siting" include just new facilities, or does it include expansion of existing facilities as well?

What does the legislation imply for the use of state property? Can local governments make the decision to change the use of state lands?

Options

A specialized process for siting essential public facilities should be considered. There are a variety of approaches possible. The one given the most attention by the Commission’s advisory committee is described below.

The process would provide for different processes depending on whether the facility is a state-wide essential public facility or a local or regional essential public facility. A state-wide facility might include a state owned and operated prison or detention facility, a new college or university, or a hospital. Other unique types of facilities, such as energy facilities currently sited through EFSEC and hazardous waste disposal facilities, might also be considered state-wide facilities. All other essential public facilities would be considered as local or regional facilities. The state-wide process would be managed by a board or council comprised of representatives from state agencies and local governments. The board could be specifically established to address essential public facilities or it could be part of another body.

Local or regional facilities would be sited by local governments using the existing GMA process. DCTED would be given authority to adopt minimum standards for the process, including timeframes for making a decision and procedures to coordinate with adjoining local governments and state agencies. If the local government process does not reach a decision within the timeframes established or if the applicant or other participants in the process believe that conditions imposed on the proposal are intended to preclude siting rather than address legitimate project impacts, a negotiated siting process may be requested.

The negotiation process would include representatives from each local government in which the facility is located or which would be directly impacted by operation of the facility, the applicant, and other parties whose participation is necessary to resolve the issues involved with the proposal. Who these parties should be and how the public would participate in the process are issues that will need to be resolved.

The facility siting committee would seek to negotiate a resolution of the siting issues with assistance from the office of dispute resolution, if available. If an agreement is reached, each local legislative body represented on the committee would have to ratify the agreement for it to take effect. The local legislative body could only accept or reject the agreement. It could not modify the agreement. If approved, the agreement is binding on all parties.

If an agreement cannot be reached, the state oversight body would be presented with the proposals from each party. The oversight body would select the proposal it determines is most consistent with state policy.
An essential component of a new process should be timelines for the local siting review process and for the negotiation, in order to limit permit delays.

As a part of the essential public facility siting process, issues of impact compensation could be included in the negotiation process for local or regional facilities or as part of the siting process for state-wide facilities. Impact compensation could include:

- For state facilities, the allocation of discretionary federal funds to the impacted community or of an existing revenue source to the impacted community for a specified period of time, e.g. state share of sales tax on construction on the project to the impacted community
- A compensation budget included as part of the project to cover impacts in addition to direct impacts covered by SEPA mitigation and impact fees. This could be modeled on programs such as “one percent for the arts.”

**Pros:**

- Proponents point out that the proposal establishes timelines for siting essential public facilities that should result in expedited decisions. They suggest that funds saved by reducing permit delays could be used to benefit communities through impact compensation and mitigation.
- Proponents suggest that thorny issues of siting essential public facilities may be reduced in Washington.
- Proponents suggest that the process could provide a mechanism for determining the need for a proposed essential public facility. They point out that the lack of a need determination is a criticism sometimes made about the process for siting energy facilities under the EFSEC process.

**Cons:**

- Those opposed to this option believe that even though there may have been problems siting some essential public facilities, many jurisdictions have successfully sited facilities. Local control advocates do not believe there is a problem that needs this type of state-wide solution.
- Some local governments believe that the proposed process will force most siting decisions into negotiation and litigation because opponents of projects will take advantage of every opportunity for delay.
- Some argue that the proposal does not address the fact that GMA has an over-broad definition of essential public facilities.

**Recommendations**

Improved procedures for siting essential public facilities should be established. In particular, the new procedures should address the definition of essential public facilities and methods to provide impact compensation and mitigation to communities impacted by the facilities.
Chapter 11
Appeals and Judicial Review

Issue Statement

The purposes served by allowing an appeal of a local land use or environmental decision are viewed differently by different interests. This has led to different views of the appropriate appellate procedure and the standards that should apply during administrative and judicial review. The basic issue to be resolved on appeal is whether the decision maker has followed the law. For some, this is largely a procedural question that does not involve an examination of the substance of the decision. For others, the question of whether the law was followed also requires an examination of whether the decision is consistent with state policy, as established by the Legislature and agency rules.

Washington’s land use and environmental system provides a variety of appeal procedures and review bodies. The procedure that applies to the appeal of land use and environmental decisions depends on the subject matter of the decision as well as the decision maker. In some instances, a decision can result in parallel appeals being heard by two different appellate bodies.

Background

Decisions implementing state land use and environmental laws are subject to a variety of review mechanisms. Most local government land use decisions are appealable to superior court under the Land Use Petition Act. This legislation was adopted in 1995 and combined the different appeal procedures applicable to permits into a single statute and eliminated common law procedures as the chief review mechanism. State agency actions are generally subject to judicial review by superior court under the Administrative Procedures Act, RCW Chapter 34.05.

Under some circumstances, prior to judicial review, a quasi-judicial state board may have review authority over the actions of a state agency or a local government. There are five separate quasi-judicial boards with authority to review land use and environmental decisions of state agencies and local governments. Decisions of the quasi-judicial appeals boards may be appealed to superior court, or in appropriate circumstances, to the Court of Appeals.

In some appeals of a local government decision on a project permit application, there is the potential that two different appeal bodies will have jurisdiction over different aspects of the project. The appeal of a project constructed within the shorelines that requires a shoreline substantial development could potentially be appealed to both the Shoreline Hearings Board and superior court. As a result, the parties may be required to present similar testimony and evidence in both forums. The SHB decision, once made, may also be appealed to superior court.

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14 RCW 36.70C.

15 These include the Pollution Control Hearings Board, Shoreline Hearings Board, Forest Practices Appeals Board, Hydraulics Appeals Board, and three Growth Management Hearings Boards.
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There are also differences in the appeal procedures depending on the forum. Superior court review is usually based on the record created by the local government or state agency. Under the SMA, the appeal of a shoreline substantial permit is heard de novo by the SHB. This means the SHB conducts fact-finding hearings and bases its decision on the record it creates rather than the record before the local government.

The standard of review on appeal varies depending on the nature of the issue. The APA provides that a state agency decision will be upheld unless the agency acted in an arbitrary or capricious manner. Most local government land use decisions are appealed pursuant to the Land Use Petition Act (LUPA) which provides for a substantial evidence standard. Under the GMA, a local government’s decisions relating to its comprehensive plan and development regulations are presumed valid upon adoption and must be upheld unless the GMHB determines the local government’s actions were clearly erroneous.

Another difference among the different boards is the types of actions over which they have jurisdiction. The Growth Management Hearings Boards only have jurisdiction to review legislative decisions of local governments. They cannot review individual project permit decisions. The Shoreline Hearings Board has authority over both legislative actions and permit decisions. In addition to shoreline permits, it hears appeals of shoreline master programs for non-GMA jurisdictions and of Ecology’s rules implementing the SMA.

The Pollution Control Hearings Board’s jurisdiction is largely limited to review of Ecology actions in adopting rules, issuing permits, or imposing penalties or other sanctions. It does have authority to hear appeals of penalties imposed by the regional air pollution control authorities.

Most of the quasi-judicial boards are required to have members who are representative of the different political parties and who have expertise in the subject matter. Board members are not generally required to be attorneys, although most boards are required to have at least one attorney member.

The boards generally do not have authority to review constitutional issues.

In 1997, the Legislature changed some of the procedural standards that apply to Growth Management Board review of city and county GMA decisions. The changes were intended in part to give local government decisions greater weight on an appeal before the GMHBs.

Discussion

The role of quasi-judicial boards in Washington’s land use and environmental system has received considerable attention in the last few years. Quasi-judicial boards are created for a variety of reasons. Their proceedings are often less formal and more accessible to those not represented by attorneys. The boards can provide level of land use or environmental expertise that some believe is more difficult to achieve in the judicial system. A quasi-judicial system also can provide some degree of state-wide consistency. An another advantage that proponents of quasi-judicial review see is that it brings the perspective of non-lawyers into the review process.
A common objection to the quasi-judicial boards is that they place appointed state officials in the position of reviewing, and in some cases overturning, decisions of locally elected officials. Under the GMA process, this is thought to undermine one of the principle elements of the GMA, which is the local control it gives to counties and cities. There are also objections raised that the quasi-judicial boards substitute their judgment for that of the local legislative body, rather than limit their review to legal issues. An appeal to court is felt to be preferable because the judges are directly accountable to the public through the election process. Courts are thought to be more experienced in applying the law and more familiar with separation of powers issues. There is also a concern that the quasi-judicial process is often an extra step in the review process that only adds time and cost.

The review procedure for shoreline substantial development permits presents an additional issue. Shoreline permits are heard *de novo* by the SHB. Local governments and developers frequently believe that this procedure causes unnecessary delay and allows opponents to withhold information and objections until the SHB hearing, rather than presenting all of the information at the local government hearing. They also point out that the process can result in two different review proceedings on the same project, one before the SHB and the other in superior court, with many of the same issues and evidence before both bodies. The SHB decision is then also appealable to superior court. Reform advocates question the SHB’s cost effectiveness given the small number of local government permit decisions overturned by the board.

Proponents of the current SHB process believe that the shorelines are a fragile and unique resource that require special attention and protection. They point out that many local government’s have hearing procedures that do not meet the test of basic due process and fairness. The environmental community and state agencies point out that there is little evidence that duplication of proceedings is a serious problem. They note that only a small percentage of shoreline permits are appealed to the SHB and that only a portion of those permits end up in a hearing before the board. They also see *de novo* review as a means to assure that decisions affecting the shorelines are made based on scientific evidence and that the state-wide interest is not dismissed in favor of the more limited local interest. State agencies and the tribes also note that they have limited resources that make it difficult to keep abreast of and participate in every local permit process involving the shorelines. The tribes also note that with limited resources, they need to present their case in a forum where they believe they are more likely to receive procedural due process. The *de novo* review procedure provides a mechanism to assure that in those cases where it is necessary, additional evidence can be provided.

**Options**

**Status Quo**

Retain the current process with appeals going to one of the existing hearings boards or superior court, depending on the issue.

*Pros:*

- The environmental community and state agencies note that the majority of local land use decisions do not result in any appeals. They suggest that legitimate
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concerns about duplicate processes can be dealt with in other ways. They do not believe there is a need to change the underlying structure of the boards.

• Proponents of the status quo note that each of the existing hearings boards has expertise in its subject matter. They believe that eliminating or combining the boards will result in a loss of both historical perspective and consistency of application.

• State agencies and environmental organizations argue that the boards are important in ensuring that local concerns and desires do not override statewide interests.

  Cons:

• Opponents of the status quo argue that even if the actual number of cases appealed is small, the threat of becoming mired in the appeals process may cause a project applicant to accept conditions that could not be mandated.

• Some favoring changes argue that the current process can be used by a party to either prolong a final decision as a way to try to kill a project or to wear out an opponent.

• Some local governments and rural landowners believe the current process involves state boards in reviewing decisions that should be left to local discretion. They see this as an inappropriate intrusion of the state into local processes.

Eliminate SHB de novo Review For Some Decisions

Minimum procedural standards would be established for local government hearings on project permits. The standards would need to include provisions for notice to the public and state agencies and tribes with an interest in the subject matter of the permit. The standards would also address the conduct of the proceedings, including the applicable rules of evidence, preparation of the record, and the use of and experience of hearing examiners. If a local government adopts hearing procedures meeting these standards, its shoreline permit decisions made pursuant to those procedures would be heard by the SHB on the record made by the local government. The SHB could take additional evidence upon a showing that the evidence was unavailable or for other reasons supporting opening of the record.

  Pros:

• Some local governments argue that this option will provide a means to ensure that local governments are presented with all of the evidence to make an informed decision.

• Some believe that this change will discourage parties from “hiding in the weeds” and waiting until an appeal to present their best evidence.

• Proponents argue that this proposal provides an opportunity both to ensure protection of the state interest and to streamline the appeal process.

  Cons:

• Some in the environmental community argue that this approach will create two different appeal systems and create confusion. They suggest it is better to have one appeal system for all jurisdictions.
• State agencies and the tribes point out that they do not have the resources to participate in all of the local government hearings that this proposal would require. They believe the likely result will be further degradation of the state’s shorelines.

• Some in the environmental community are concerned about the SHB losing the ability to make factual findings. They believe this may reduce environmental protection.

Unified Hearings Board
The existing hearings boards would be combined into a single hearings board. Appeals of the board’s decisions would be filed in the Court of Appeals, bypassing superior court. One variation would provide for regional hearings boards, similar to the three Growth Management Hearings Boards. Another variation would be to have one board, but with members appointed from around the state and sitting as regional panels.

Pros:
• Some in the business community believe the GMHBs will see a declining caseload in the next few years, calling into question the need for three full time boards.
• Proponents point out that a board with jurisdiction over all related land use issues would be able to resolve those issues in a single proceeding. They believe this would help in resolving inconsistencies in application of different statutes.
• Some have suggested that if the board were established with regional panels, the ability to provide for regional flexibility in the implementation of the different environmental statutes would be increased.
• Proponents argue that a unified board would provide a way to ensure that interests of other jurisdictions and the public are appropriately considered.

Cons:
• Advocates for local control are concerned that the proposal will expand state control at the expense of local authority.
• Some in the business community argue that the proposal does not eliminate any steps in the review process. They believe it only substitutes the hearings board for superior court.

State Land Use Court
Appeals of land use decisions would be filed with a state land use court. There are three ways in which the court could be established. The first option would be to establish the land use court as an inferior court to superior court, similar to the relationship between district court and superior court. This could be done by statute.

A second option would be to create a special division of the superior court, called the land use court. If this were done on a county by county basis, no constitutional change would be required. For example, the juvenile courts are established by statute. However this would not provide for any state-wide consistency. If the land
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use court were established statewide at the superior court level, a constitutional amendment would probably be necessary.

A third option would be to either create a new division of the court of appeals or have the court of appeals establish a special panel to hear land use cases. The first alternative could be accomplished by statute, since the constitution gives the Legislature considerable flexibility in establishing the jurisdiction and structure of the Court of Appeals. The second alternative could be accomplished by statute or by court rule.

**Pros:**

- Proponents note that a land use court would have the authority to decide all issues, including constitutional questions. They also suggest that the members of the court would develop expertise in land use and environmental law.
- Proponents suggest that if the court were established on a regional or statewide level, matters of statewide concern would be more likely to receive appropriate consideration and there would be greater consistency of application of state laws across the state.
- Those who favor the court of appeals option note that this would eliminate one step in the appeal process.

**Cons:**

- Some people believe that creating a new court would add to an already complex judicial system.
- Some have suggested that, unless the court is established at the Court of Appeals level, there would not be any significant improvement in the overall process. They believe there would only be a substitution of one forum – superior court or the hearings board – for another – the new land use court.

**Superior Court**

Eliminate the hearings boards and provide that all appeals are filed with the superior court. The authority of the superior court to appoint special masters could be expanded to address the need of some courts to obtain the expertise necessary to resolve technical issues that may arise.

**Pros:**

- Proponents of this option note that it would provide a forum where all questions, including constitutional issues, could be resolved in a single proceeding.
- Some favor the proposal because it relies on elected judicial officers to review the decisions of other elected officials. They also believe it allows decisions to be made locally, at less cost to the parties. They note that it relies on an established process, with rules and procedures that are well understood.

**Cons:**

- Some people argue that the proposal will require knowledge of land use and environmental laws that few superior court judges have. They acknowledge that access to special masters may help, but do not believe this removes the underlying problem of a lack of land use and environmental law expertise on the part of some judges.
• Some in the neighborhood and environmental communities express the concern that local superior courts will reflect the interests of the local elected officials and that issues involving statewide interests may not be given appropriate consideration. They express concern that county legislative authority over the superior court’s budget may create an appearance of a conflict of interest.

• Environmental and public interest groups argue that judicial proceedings will be more formal and intimidating to citizens who cannot afford legal counsel.

Court of Appeals
Under this option, appeals of land use decisions would be filed directly with the Court of Appeals.

Pros:
• Proponents of this option note that it relies on existing judicial mechanisms. They note that it does not require a new court or hearing board and that the only added cost might be the need for additional judges. They suggest some of this cost may be offset by a reduced workload in the superior courts and hearings boards.

• Some people have noted that the Courts of Appeals judges have access to law clerks and other resources helpful in reviewing and analyzing cases. These are resources not always available to the hearings boards or to superior court judges.

Cons:
• Some with concerns about this option note that a case before the Court of Appeals can take from one year to 18 months, including time for briefings, oral argument, and written decision. They point out that most superior courts and hearings boards often issue their decisions more quickly.

• Some have noted that land use appeals, particularly those involving projects, may require fact-finding hearings. They note that fact-finding is not something the Courts of Appeal are set up to easily handle.

Sunset Growth Management Hearings Boards
The GMHBs would be phased out over six years and their jurisdiction to hear appeals of amendments to comprehensive plans or development regulations would be eliminated. Appeals of amendments would be heard by superior court. The boards would have jurisdiction over adoption of a new comprehensive plan or development regulations and over pending cases. In 2000, the three boards would be consolidated into a single six-person board, which would function in two, three-member panels. In 2002, the number of members would be reduced to three. In 2004, the board would sunset and all future GMA appeals would be heard by superior court.

Pros:
• Proponents note that the majority of local government actions during the first round of planning under the GMA is nearing completion. They believe that the number of appeals to the boards will decline in the near future and that the cases before the boards will tend to involve site specific issues and will involve fewer
broad public policy issues. They argue that these types of cases are more appropriately handled by the judicial system.

**Cons:**

- Opponents of this option argue that there will continue to be important public policy issues involving the implementation of GMA. They believe the expertise provided by the boards will be an important tool for resolving these issues.
- Some in the environmental community do not believe board case loads will decline. They point out that the need to address ESA and other environmental and growth management issues will result in GMA plan amendments and probably result in more appeals.
- Some have suggested that the controversy over the GMHBs has been largely due to ambiguity and uncertainty over the implementation of the GMA. They do not believe there are any inherent problems with the boards or the quasi-judicial review process justifying elimination of the boards.

**Recommendations**

Although nearly all parties agree that the current system for review of land use and environmental decisions is not perfect, there is no consensus to support any major changes to the land use and environmental appeals process at this time.

There is speculation that GMA appeals will diminish over time, however the Growth Management Hearings Boards currently have an adequate work load. The Commission’s recommendation is to maintain the status quo for the time being, while giving further study to the alternatives and the issues that divide the constituents who care deeply about this issue.

Some of the issues on which there are significant divisions include:

- The environmental community, neighborhood groups, and tribes believe that the existing layers of appeals serve as an added element of environmental protection. They argue that the current appeal system works well and that there is no evidence showing any significant problems. They point out that many of the environmental statutes address matters that are of state-wide concern and that the appeal process needs to assure that those state-wide interests are protected. At a time when salmon recovery is a concern, they advocate that this is not the time to tinker with the Shoreline Hearings Board. They also cite to the expertise of the Shoreline Hearings Board and the Growth Management Hearings Boards in environmental and land use matters. They also prefer administrative boards because such forums are more accessible to non-lawyers. Some neighborhood groups view state or regional administrative boards as more independent of local elected officials than superior court. Environmental groups object to one provision added in 1995 that provides for an award of attorneys’ fees to the prevailing party in cases on appeal to the Court of Appeals. If the plaintiff has not prevailed before the local government or the superior court and loses at the Court of Appeals, reasonable attorney’s fees can be imposed against the plaintiff. They believe the potential for an award of attorneys’ fees acts as a disincentive for the filing of legitimate actions.
• The business community cites to duplicative and inconsistent appeals statutes that can result in one project being appealed to different forums. They cite to the cost of de novo review, where local government proceedings on shoreline permits become meaningless if appealed to the Shoreline Hearings Board. They express concern with the Growth Management Hearings Board substituting its judgment for that of local elected officials and believe that superior courts have more experience in respecting the separation of powers.

• Local governments express frustration with the shoreline permitting process where new information and evidence may be produced at the de novo hearing, without giving local elected officials the right to review the new evidence. They would prefer an option that would provide for a hearing on the local government record if the local government conducts the hearing consistent with minimal standards for the conduct of administrative hearings. Local governments also referred to the “stove-piping” of issues that can occur under the current system, where shoreline and upland impacts are reviewed in two different systems, when GMA was directed at an integrated approach. Some local governments also expressed frustration with having an appointed board overturning the decision of local elected officials.

• State agencies had differing views. WSDOT spoke in favor of the status quo. Ecology and DNR agreed that in the perfect world, they would be able to present their concerns to local officials first. The current shoreline permit system allows state agencies to wait and raise their concerns for the first time in an appeal to the Shorelines Hearings Board. Although they recognize the potential for unfairness and inefficiency in such a system, it is a personnel resource issue. At present, they do not have the staff or other resources to stay informed and participate in all local projects. Even if the agency is notified of a project, it is not always adequately funded to participate in the local permit review process. The tribes have similar personnel resource issues.

• Some rural land owners believe that the Growth Management Hearings Boards have too much authority. They see the judicial system as the forum to correct the problems created by the boards. These rural land owners believe that judicial review combined with governor sanctions are the best tools to ensure that counties and cities are complying with the GMA. They believe that this system will also honor the GMA’s promise of local control.

• The Commission’s agricultural representative from Eastern Washington noted the importance of geographic diversity of the decision makers participating in the appeals process. He felt it was important to maintain that diversity in any appeal process.
Chapter 12
Enforcement

Issue Statement

Effective enforcement of local and state land use and environmental regulations and
of permit conditions is critical to maintaining the state’s quality of life. Most local
governments and state agencies claim that they have inadequate resources for
enforcement. This can lead to inconsistent application of the law and to frustration
by members of both the public and the business community.

Background

Fines and Penalties

State statutes and local ordinances provide a wide range of penalties for
enforcement of environmental and land use laws.

There are two basic means that are generally used to impose a fine or penalty: by
the violation; and per day of violation. Many penalty statutes may also include
provisions for orders to correct damages. Criminal penalties and seizure and
forfeiture of personal property may also be available under some circumstances.
Penalties are generally assessed in writing. Fines often must be paid within a
specified period and usually are appealable.

The Shoreline Management Act provides for criminal penalties\textsuperscript{16}, recovery of
damages to the environment,\textsuperscript{17} and civil penalties.\textsuperscript{18} The Department of Fish and
Wildlife has authority to assess civil penalties for violation of the hydraulics code.\textsuperscript{19}
Washington’s Oil Spill Legislation imposes significant civil and criminal penalties for
violations.\textsuperscript{20}

\textsuperscript{16} “A fine of not less than twenty-five nor more than one thousand dollars or by imprisonment in the
county jail for not more than ninety days, or by both such fine and imprisonment:\ PROVIDED, That the
fine for the third and all subsequent violations in any five-year period shall be not less than five hundred
nor more than ten thousand dollars…” RCW 90.58.230.

\textsuperscript{17} “Any person subject to the regulatory program of this chapter who violates any provision of this
chapter or permit issued pursuant thereto shall be liable for all damage to public or private property
arising from such violation, including the cost of restoring the affected area to its condition prior to
violation.” RCW 90.58.230.

\textsuperscript{18} “A person who violates RCW 90.58.550, or any rule adopted thereunder, is subject to a penalty in an
amount of up to five thousand dollars a day for every such violation. Each and every such violation
shall be a separate and distinct offense, and in case of a continuing violation, every day’s continuance
shall be and be deemed to be a separate and distinct violation. Every act of commission or omission
which procures, aids or abets in the violation shall be considered a violation under the provisions of this
section and subject to the penalty provided for in this section.” RCW 90.58.560.

\textsuperscript{19} RCW 75.20.106.

\textsuperscript{20} See, e.g. RCW 88.46.080 making it a gross misdemeanor to knowingly operate a vessel in violation
of the state’s oil spill prevention legislation and RCW 88.46.090 imposing penalties of up to $100,000
per day for certain violations of the oil spill statutes.
Enforcement

Enforcement of land use laws generally is the responsibility of local government. Local governments have adopted a wide variety of penalty provisions. For example, Jefferson County imposes civil penalties of up to $1,000 per day per violation of its floodplain management statutes. Yakima county provides a civil penalty of up to $50 per day of violation of its land use code and also provides for criminal penalties.21 The tribes have also adopted penalty provisions. For example, the Tulalip Environmental Infractions Code assesses a range of fines — depending on the classification of the infraction — from $500 to $5,000, and assesses these fines each day of a continuing violation. There is also provision for seizure and forfeiture of personal property that is applied primarily to cultural resources violations or unauthorized hunting and unauthorized removal or destruction of tribal resources.23 Although criminal penalties may have a greater impact on a violator than civil penalties, criminal penalties are more difficult to enforce, in part because the process for imposing them is more complicated. In the 1970s, King County made significant changes to its penalty provisions, replacing many criminal penalties with civil penalties. At least part of the reason for the change resulted from the reluctance of prosecutors to use the criminal sanctions.

Third Party Enforcement

Third party enforcement, or citizen suits, allow a private citizen to bring an enforcement action on behalf of the government against a person alleged to be violating a state or federal law. Although these types of actions may be available at common law, some federal, state, and local laws specifically authorize them. The Federal Solid Waste Disposal Act, for example, allows any person to bring an action against a person, including a governmental entity, who is alleged to be in violation of a permit, condition, standard, rule, or order implementing the solid waste disposal act. 42 U.S.C. 6972. Prior to commencing the action, the plaintiff must give 60 days notice to the federal government, the state, and the alleged violator. The federal district court may award costs, including reasonable attorney’s fees, to the prevailing party. The Federal Clean Water Act has a similar provision. 33 U.S.C. 1365. Since the Federal Clean Water act imposes strict liability for water pollution, the cost provision is viewed by the environmental community as essentially benefiting plaintiffs. The environmental community also argues that the courts have interpreted the Federal Clean Water Act to allow attorney fees against the plaintiff only if the plaintiff’s suit was frivolous or brought for purposes of harassment. Washington law also has provisions allowing private citizen suits. Under the Shoreline Management Act, a person may bring an action for damages on his or her behalf alleging a violation of the SMA or of a permit issued pursuant to the SMA. RCW 90.58.230. Damages can include the cost of restoring the area affected by the violation. Money damages, attorney’s fees, and costs of the litigation may be awarded to the prevailing party, which can be either the plaintiff or defendant.24

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21 Yakima County Code 15.25.030.
22 YCC 15.25.020.
23 Tulalip Environmental Infractions Code 17.020.
Since the 1980’s, Island County’s Zoning Code has permitted citizens to bring an enforcement action before the county’s hearing examiner. Any aggrieved person may file a written complaint with the planning director alleging a violation of the Island County Building Code. A complaint may not be filed for an action for which an administrative or judicial appeal is available. The planning director is required to schedule a public hearing before the hearing examiner to take place within 60 days after the complaint is filed. The examiner must make a decision within ten days. The examiner may award costs to the prevailing party.

One concern raised about citizen suits is the potential they present for frivolous lawsuits or for purposes of harassment. State law does include provisions intended to limit the potential for frivolous legal filings. The court may award reasonable costs if it determines that a legal filing was frivolous and advanced without reasonable cause.

**Natural Resource Damage Assessments**

Washington’s oil spill prevention legislation provides a means for assessing the damage to the environment caused by an oil spill. A person who spills oil into Washington waters is strictly liable for the damages caused. Damages are in addition to any penalty or fine imposed. The damages can be imposed either pursuant to a compensation schedule adopted by Ecology rule or through a damage assessment process. Damages are based on the harm caused to the state’s natural resources. Any damages recovered are placed in the coastal protection fund and can only be used for restoring natural resources.

**Dedicated Accounts**

Generally, any fines, penalties, or assessments arising out of a violation of a state or local law will be deposited in the general fund of the enforcing authority. However, under some state programs fines, penalties, and assessments are deposited into a fund dedicated to a specific purpose, generally related to the regulated activity. For example, Washington’s Water Pollution Control Act provides that fines, penalties, damages recovered for violations of the act are deposited in the Coastal Protection Fund and are used to restore the state’s natural resources.

Another example is the water well construction program managed by Ecology. Fees and penalties collected under the regulatory program are paid into the state reclamation account. The account is used to support the well drilling construction program as well as for the “reclamation and development of such lands in the state

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25 Island County Code, Sec. 17.02.240.
26 RCW 4.84.185.
27 RCW 90.48.364-.368.
28 RCW 90.48.390.
29 See, e.g., Yakima County Code 15.25.080, placing civil penalties for violations of the land use code in the county general fund. See, also, RCW 76.09.170 which provides that penalties for violation of the forest practice laws and rules are to be deposited in the state general fund, or under some circumstances, in a local government’s general fund.
30 See Footnote 28.
31 Ch. 18.104 RCW.
32 Ch. 89.16 RCW.
Enforcement

of Washington as shall be determined to be suitable and economically available for reclamation and development as agricultural lands....

Discussion

The enforcement of permit conditions is an important component of the land use and environmental system. Fair and consistent enforcement provides at least two benefits. First, enforcement can ensure that permit conditions designed to protect the environment or protect the public health or safety are followed. Second, effective enforcement ensures that all permit holders are subject to the same rules and costs and that there is no competitive advantage for not complying with the law.

A recent study conducted by King County of wetland and stream mitigation evaluated the success of mitigation imposed through project permits. The study examined forty mitigation sites in King County both in terms of compliance with performance standards and with success at replacing wetland functions. Six sites (21%) met the performance standards. Only one site (3%) was successful in its objective of replacing wetland functions. The report identifies design flaws, installation problems, and maintenance as the prime causes for failure. The report recommends changes to King County’s guidelines for mitigation plans and inspection procedures.

Although the Commission was not presented with studies, a number of sources stated that enforcement does not receive priority for funding from either state or local governments. State and local enforcement agencies frequently claim that they have limited resources available for enforcement.

In public comment on the Commission’s draft report, enhanced enforcement received considerable support from both the environmental community and state agencies. The business community believes that before any additional enforcement mechanisms are created, existing laws should be enforced. It also suggested that a study examining the enforcement issue should be conducted before the Commission proceeded to making any recommendations.

In addition to fines and penalties, there are a number of longstanding non-monetary and non-punitive enforcement tools available to local and state governments. Public entities may file a lawsuit and seek an injunction against an individual or entity that is not following the law. Individuals can also bring an action against a governmental agency under common law legal theories to force a governmental agency to take an action that is required by law. Finally, those who are being harmed by the actions of another, may be able to bring file a lawsuit claiming a common law nuisance. The legislature by statute may expand the common law definition of nuisance.

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33 RCW 89.16.010.

34 “Results of Monitoring King County Wetland and Stream Mitigations,” Anna Mockler, King County Department of Development and Environmental Services (August 4, 1998).
Options

Civil Penalties
A standardized set of civil penalties should be considered, and in particular should supplement criminal penalties where they are the only option for enforcement.

*Pros:*

- Proponents note that criminal penalties are difficult to impose. They suggest that unless a violation is particularly egregious, it does not receive priority from prosecutors.
- Proponents argue that standardized penalties would provide some state-wide consistency and assurance that violations of land use laws result in appropriate sanctions.

*Cons:*

- Some in the business community point out that most, if not all, local governments already provide civil penalties for land use code violations. They believe this is a matter that should be left up to local discretion.

Natural Resource Damage Assessment
A mechanism for assessing costs for damage to the environment should be considered.

*Pros:*

- Proponents argue this mechanism will help to ensure that unlawful conduct is punished and that the harm it causes is rectified. They note that minor violations of a statute can sometimes cause significant environmental harm.

*Cons:*

- Some in the business community point out that local governments can already adopt this approach if they wish. They believe this is a matter that should be left to local discretion.

Place Penalties and Assessments in a Dedicated Fund
Local governments and state agencies could be required to place fines, penalties, and assessments from violations of land use and environmental statutes into a dedicated account that is used for natural resource restoration and enforcement program support.

*Pros:*

- Proponents note that penalties are often placed in the general fund and do not help fund enforcement or result in environmental benefits. They suggest that establishing a dedicated fund for enforcement and environmental restoration can be an effective tool to address problems caused by violations. They also suggest that violators may also be more willing to pay penalties if they know the funds will be used to improve the environment rather than to support the general fund.
Enforcement

Cons:

- Some in the business community note that local governments and state agencies already have this authority. They argue that local governments should be allowed discretion on how to spend their revenues, including money raised through fines and penalties.

Third-Party Enforcement

Citizen suits could be specifically authorized as part of the consolidated land use code. Notice to the governmental entity responsible for enforcing the law, rule, or permit at issue would be required before an action could be filed. Issues that will need to be addressed include: what types of actions are subject to the citizen suit provisions; whether a decision by the governmental entity to take enforcement action precludes the filing of the citizen suit; what remedies are available; and whether reasonable attorney’s fees may be awarded and to whom.

Pros:

- Environmental organizations argue that citizen suits allow the private sector to perform a governmental function at potentially no cost to the government. They suggest that with little funding available for enforcement by governmental agencies, citizen suits provide a way to privatize enforcement.
- Environmental organizations point out that a number of state and federal statutes include citizen suit provisions. They believe the benefits of those statutes outweigh any problems that may exist.

Cons:

- The business community believes citizen suits will present a significant potential for project delay and harassment. They note that during the construction period, projects are particularly vulnerable because financing may be lost as a result of lawsuits.
- The business community argues that compliance, not enforcement, should be the goal. It suggests that more study is needed to identify why mitigation fails. They note that it may be the flawed design standards, not the actions of the project owner that are the problem.
- Local governments express concern that they will be joined as parties and will be liable for damages.

Non-monetary and Non-punitive Enforcement Options

Explore ways to expand the use of non-monetary and non-punitive enforcement tools. Among the options that should be considered is expanding the ability of those impacted by a violation to bring a nuisance action.

Pros:

- Proponents suggest there is a need to develop mechanisms to improve enforcement that do not rely on penalties. They note that monetary penalties do not necessarily restore the harm to the environment. That suggest that the aim should be to change the behavior that causes the harm rather than focus on penalties.
Cons:

- Those with concerns about this approach note that it is dependent on the judicial system, which can be expensive and time consuming. They suggest that administrative sanctions may achieve a more consistent and timely result.

Recommendations

Mechanisms to enforce development regulations and permit conditions is an issue that must be addressed by a consolidated land use code. There are many options that merit further consideration, as outlined in the body of this report. There was a consensus on the Commission for a fair system of enforcing permit conditions and for the need for additional enforcement of existing laws and regulations. However, there was not consensus on whether new enforcement mechanisms are necessary or what they should be. Some of the views are as follows:

- Local governments cite a lack of sufficient funding for permit enforcement. Local permitting and inspection efforts vary greatly from community to community. Local enforcement efforts generally reflect local levels of development pressure and local issues. Smaller jurisdictions often have only one inspector to cover a very large area. Some local governments have innovative enforcement ordinances, such as Island County where third party enforcement is allowed. Local governments make it clear that unfunded mandates would not be welcome.

- The environmental community, neighborhood groups, and the Commission’s tribal representative cite cases where permit conditions are not implemented or monitored, leading to environmental harm. They believe more enforcement options, and perhaps mandates, are needed. The environmental community advocates for the right to act as private attorneys general, and the right to recoup attorneys’ fees for the prevailing plaintiff. A prevailing defendant would be entitled to attorneys’ fees only if the action was found to be frivolous or brought for purposes of harassment.

- The business community states that enforcement needs more study, and should be based on facts, not anecdotal evidence. They note that many of the ideas presented in the discussion of the issue can already be implemented and that legislation is not necessary. They fear increased litigation costs and permit fees to cover enforcement costs. Small builders cite permit fees as one problem standing in the way of affordable housing. The business community opposes private attorney general suits. They also believe that a system under which only plaintiffs get attorneys’ fees is unfair and will lead to increased litigation and frivolous suits. They also note that if private attorney general suits are authorized, they should apply only to post construction issues. Otherwise, project opponents can stop projects during construction when financing is vulnerable.

- State agencies note that the objective is compliance, not enforcement, and suggest greater focus on the use of existing enforcement tools. An analysis of where the problems occur may lead to better environmental protection. For example, King County performed a study on wetland mitigation. Problems occurred at all stages, including design, construction, and enforcement.
Chapter 13
Funding

Issue Statement

The problems faced by local governments in financing their planning, permitting, enforcement, and construction activities have been long understood. The GMA has brought increased attention to the financing issue. The impacts of incorporations, annexations, and limitations on development outside of urban growth areas have raised revenue issues for both cities and counties. Incorporations and annexations also involve issues of infrastructure and services for urbanizing areas both within and without urban growth areas. In addition to the other tools provided by the GMA to address the impacts of growth, the provision of adequate infrastructure is an important tool that can help fulfill the objectives of the GMA.

Background

Financing of local government needs has been a perennial issue in Washington. Local governments are responsible for providing a wide array of basic governmental services. These include the provision of infrastructure and other community capital needs.

Local governments have a variety of revenue sources to fund their services, including sales and property taxes, business and occupation taxes, permit fees, user fees, service charges, and impact fees. In addition, the state provides some funds through grants and loans for a variety of infrastructure needs. Some funds are also available from the federal government, although the amount of federal funds available has been decreasing.

Local governments may generate funds through the sale of bonds. They may also create local improvement districts with the authority to assess property for a variety of improvements.

Washington’s population increased by 818,637 from April 1, 1990 to April 1, 1998, with a significant share of the increase occurring within incorporated cities and towns. The Association of Washington Cities estimates that approximately 91% of the eight year population growth was in cities and towns. 68% of the growth resulted from annexations and new incorporations. The remaining 32% was due to population increases.

Annexations and incorporations can have an impact of county and city revenues. Upon annexation or incorporation, there is a shift of some of the sales tax and property tax revenue from the county to the city. Counties and cities have a variety of ways of addressing this issue. The Interlocal Cooperation Act (Ch. 39.34 RCW) allows counties and cities to enter into a wide variety of agreements. For example,

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36 See, e.g., the Public Works Trust Fund (RCW 43.155) and the Centennial Clean Water Account (RCW 70.146).
Thurston County and the City of Lacey entered into an agreement in 1990, prior to the GMA, to address issues related to annexations by the city. Under the agreement, the sales tax revenue that would have otherwise immediately accrued to the city upon annexation was subject to a gradual phase in over a five year period, with the county receiving less and the city more each year. Although the agreement was not renewed when it expired, in 1995 Thurston County and the cities of Lacey, Olympia, and Tumwater entered into a memorandum of understanding to address other annexation issues, including the development standards the county will apply in the unincorporated urban growth areas.

The 1994 Legislature authorized the development of service agreements between counties, cities, and special purpose districts to deal with the provision of governmental services. The service agreements may include provisions for transfer of revenue between local governments based on their obligations for providing governmental services. In addition, the legislation directed counties of over 150,000 population to convene a meeting with the cities and special purpose districts in the county. A service agreement was to be adopted not later than January 1, 1997, or a progress report was to be submitted to the Legislature. No service agreements were adopted under this provision by the January 1, 1997 date, and only a few counties submitted progress reports.

In 1995 the Legislature created the Planning and Environmental Review Fund (PERF) to help pay for comprehensive plans, subarea plans, and development regulations that are integrated with environmental review. The fund was proposed as a way to facilitate the integration of GMA and SEPA. The expectation was that by financing a variety of projects, an improved planning process could be used to streamline the permitting process without any reduction in environmental protection. The Legislature appropriated $3 million to the fund in the 1995-97 biennium. No funds were appropriated to the PERF in the 1997-99 biennium.

In 1998, the Legislature appropriated funds to the Public Works Board to study the amount of need for financing for capital facilities. The study will be submitted to the Legislature in 1999.

Prior to the GMA, counties and cities were prohibited by statute from imposing impact fees as a condition for issuing development permits. However, under SEPA a county or city could impose mitigation requirements on projects, which frequently included the provision of infrastructure or the payment of funds to address the impacts of the project. The GMA authorized GMA counties and cities to impose impact fees for a specific list of capital facility needs. Impact fees may be collected for: publicly owned streets and roads, parks, open space, and recreation facilities; school facilities; and fire protection facilities in jurisdictions that are not part of a fire district. The local government must place the fees in a dedicated account and they may only be used for the purposes for which they are collected. If they are not used within six years, they must be refunded.

Another method of financing infrastructure that has been much discussed in Washington is tax increment financing. Under a tax increment financing program,

37 Ch. 36.115 RCW.
38 RCW 36.115.050(6).
39 RCW 82.02.050 - .100.
an area scheduled for improvement is designated and bonds are sold to finance infrastructure and other improvements. The increase in property tax and other revenues anticipated to result from those improvements is pledged to repay the bonds. Tax increment financing is not currently authorized under Washington law. In both 1982 and 1985 the Legislature placed on the ballot constitutional amendments to authorize certain forms of tax increment financing. The amendments were rejected by the voters. The amendment proposed in 1982 was accompanied by legislation designed to encourage economic development in urban areas.

The Washington Supreme Court in 1995 heard a challenge to a City of Spokane program relying on the 1982 legislation. The Court found that the statute violated provisions of the Washington Constitution which require certain property tax revenues to be entirely devoted to the public schools. It may be possible to draft tax increment financing legislation to avoid flaws identified by the court, but the Legislature has not enacted a new provision since the Supreme Court’s decision.

**Discussion**

The Commission has consistently heard concerns from city and county governments about the lack of financial resources to meet their responsibilities and needs under the GMA. Many of the disputes between cities and counties over GMA issues, such as annexation and development outside of urban growth areas, are due at least in part to revenue issues.

Counties express concern about the loss of revenue generating areas to cities through incorporation and annexation. Counties believe that the land that is most amenable to development is being annexed or incorporated, removing important tax bases from their jurisdiction. They cite escalating costs of providing regional services, and in particular rapid growth in criminal justice costs, as significant burdens on their financial resources.

Cities express concerns with how services and infrastructure are provided in unincorporated portions of urban growth areas. Since annexations and incorporations can only occur in these areas, cities fear that they eventually may be faced with the need to pay for infrastructure improvements because county development standards are not consistent with city standards.

Although the Legislature has given counties and cities several tools to address issues concerning the sharing of resources, the use of these devices has been relatively limited.

Other states have experimented with alternative approaches to addressing some of the same funding issues. For example, the Minneapolis-St. Paul region has implemented a tax base sharing scheme that is designed to address some of the same problems that have faced local governments in this state.41

Local government officials, particularly city officials, have stated the view that these approaches are unlikely to be successful because they are premised in part on the

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41 See “Chapter 14 – Tax Equity Devices and Tax Relief Programs,” Growing Smart Legislative Guidebook, American Planning Association.
Funding

idea that there are funds to share. It is their view that the main difficulty faced by both county and city governments is a lack of adequate financial resources. They believe it is the Legislature’s responsibility to address this issue.

In the past, federal and state resources were often available to help fulfill local government financial needs. Over time, however, these resources have disappeared. The limitations on expenditures included in I-601 places all requests for state expenditures in competition with one another. The Governor and the Legislature will need to establish clear priorities for expenditures in order to meet the I-601 targets. This makes it even more difficult for local governments to obtain the financial resources they believe they need.

As the Commission discovered when it looked at funding issues as part of its 1996 Workplan, finding a mechanism to fund ongoing planning activities is also hard to come by, even when there is a prospect for streamlined permitting.

Impact fees have been controversial since they were authorized as part of the GMA. Nearly every legislative session has seen proposals to further restrict their use or to prohibit them outright. A common objection on the part of builders and realtors is that impact fees make affordable housing difficult or impossible to achieve. Many environmental groups and neighborhood organizations believe that impact fees are set too low and are not used enough. They believe that the true cost of growth and its impact on the environment and on public services is not being recovered.

Tax increment financing has been considered in the past as a potential source of financing for infrastructure and other system improvements. However, the Supreme Court’s 1995 decision in Leonard v. Spokane means either that the flaws identified by the Court will need to be addressed through careful legislative drafting or that a constitutional amendment will be required.

One example of legislative approach is HB 1477 introduced in the 1997 Legislature. That measure provided for tax increment financing that relied only on sales and business and occupation taxes. It did not apply to property taxes.

Options

Joint Economic Development Districts

One of the major sources of new revenue for many local governments is through encouraging economic development. The establishment of joint economic development districts can serve as a way to minimize the conflicts that occur between adjoining jurisdictions trying to attract development because of the financial benefit it will bring.

Pros:

• Proponents argue that joint economic development districts would provide a means for adjoining counties and cities to all receive the advantages of economic development. Instead of competing with each other, they could cooperate. They note that although these districts can now be established by interlocal agreement, simplifying the process and providing a model could increase the usefulness of this approach to addressing intergovernmental revenue issues.
Cons:

- Those who express doubts about this option note that counties and cities already have the authority to enter into agreements for this type of district. They do not believe additional legislation is necessary.

Infrastructure Finance

The Commission proposed as part of its 1996 Annual Report that counties and cities planning under the GMA be authorized to impose a one percent sales tax on new construction. Revenue generated by the tax could only be used to pay for capital facilities identified in the jurisdiction’s capital facilities plan. The tax would be a credit against the state sales tax. The taxpayer would see no change in the total amount of tax paid. However, there would be a reduction in the total amount of revenue paid into the state general fund.

Pros:

- Proponents note that under Initiative 601, if the state takes in more revenue than it can spend, the excess revenue is placed into a reserve fund. They suggest that some of those funds could be better used for capital improvements to address the impacts of growth and that this would benefit the entire state.

- Proponents argue that this approach keeps funds where they are most needed because the amount of tax generated is tied to development activity. They also note that this is not a tax increase, but only a diversion of an existing tax from the state to local government.

Cons:

- Some in the business community point out that infrastructure finance is already being addressed in other forums. They note that the Infrastructure Study commissioned by the Legislature in 1998 will be available next year. They suggest that any recommendations at this time on finance are premature and believe the Commission should not include this topic in its report.

- Some people have noted that the state’s revenue picture has changed considerably since the Commission first proposed this approach in 1997. They point out that with the recent economic downturn and the passage of Referendum 49, the revenue surplus on which this proposal was premised has nearly evaporated. They believe these changed circumstances show one of the difficulties this type of solution presents.

Regional tax base sharing

This is modeled on the Minneapolis-St. Paul regional approach and would authorize counties and cities to negotiate ways to share increases in tax revenue that result from planned activities. Increases that might be shared could include increased property tax revenue due to increased property values or increased sales taxes resulting from particular developments. As described above, local governments may be skeptical of this approach since it relies in significant part only on shifting existing or reasonably anticipated revenue sources form one local government to another.
Funding

Pros:

• Proponents note that although counties and cities can enter into a variety of interlocal agreements, giving them explicit authority to enter into certain kinds of revenue sharing agreements may facilitate their use.

• Proponents also note that this approach has been successful in other parts of the country and deserves further consideration and development here.

Cons:

• Cities believe that any approach to revenue issues that just splits existing revenues in different ways does not address the underlying problem that local governments do not have enough financial resources available to them.

• The cities understand that counties have financial difficulties that deserve attention, but believe that those problems should be addressed directly rather than through trying to siphon off revenue that would otherwise go to the cities.

Tax Increment Financing

Tax increment financing could be authorized. In the past, most proposals have limited the program to specific geographic areas, usually urban areas suffering urban decay. If done solely through legislation, a tax increment financing program will need to avoid constitutional issues involving property taxes and school funding. As an alternative, a constitutional amendment could be drafted to specifically authorize this financing technique.

Pros:

• Proponents of tax increment financing claim that it has been effectively used in other states to provide funds necessary to address growth related impacts. They see it as a valuable tool to encourage economic development in areas that might otherwise be overlooked.

Cons:

• Opponents of tax increment financing note that the voters have twice rejected this financing scheme. They also express some concern about the speculative nature of the repayment mechanism and worry that the general taxpayer will be required to make up payments if the expectations for increased revenues do not occur.

Planning and Environmental Review Fund

The Commission, as part of its 1996 Annual Report, recommended a continuation of appropriations to the Planning and Environmental Review Fund (PERF) at the same level as when it was established - $3 million for the biennium. The Commission concluded that additional time was necessary to test the benefits of the approach and establish a long term funding mechanism.

Pros:

• Proponents of PERF believe that the benefits of the PERF projects are just beginning to appear in the jurisdictions that received funding. They argue that further funding is necessary in order to sustain those projects and to generate the information necessary to demonstrate how to best integrate planning and environmental review.
Enforcement

- Proponents argue that the PERF provides funds for exactly the kind of projects that address the vision of a consolidated land use code, where environmental review during planning can be used to streamline project review without sacrificing environmental protection.

  Cons:

- Those with concerns about PERF point out that there are limited funds available for grant programs like PERF. They suggest that the value of the projects may not have been demonstrated to a sufficient degree to support its continued funding.

Impact fees

There could be additional review of impact fees and whether they should be allowed for additional types of capital facilities.

Pros:

- Some argue that the current limitation on the kinds of projects that can be funded out of impact fees makes it difficult for local governments to finance the facilities the public expects and that result from growth.

- Proponents of impact fees argue that the fees when fairly applied ensure that growth is not subsidized by the general taxpayers. Proponents see them as a fairer way to assess costs than the ad hoc mitigation fees commonly used through SEPA.

Cons:

- The building industry argues that impact fees add significant costs to housing prices and are a major factor in the affordable housing crises that they believe the region is facing.

- There are concerns in the building industry about the timing of impact fee payments. It also seeks assurance that impact fees are used for the purposes for which they were collected.

Recommendations

Provide a variety of funding tools 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.
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.


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. 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.
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' 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
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.


**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.
Chapter 15
Conclusion

The Land Use Study Commission has conducted an extensive public process over the past three years to evaluate how a consolidated land use code could be implemented in Washington State. During this period, many diverse viewpoints have been expressed about Washington’s current land use and environmental laws. The current system relies on a number of independently adopted laws, including the Growth Management Act, the Shoreline Management Act, and the State Environmental Policy Act. A number of efforts have been undertaken over the last few years to integrate these statutes, both at the state level and at the local level. Some progress towards this goal has been made.

The system is not entirely broken, nor is it perfect. There is a consensus that there is room for improvement in Washington’s land use and environmental regulatory system. A consolidated land use code has the potential for many positive benefits; however, at this time, the consensus necessary for its adoption is not present.

This does not mean that the journey must end. This final report is an important milestone toward reaching the goal of a consolidated land use code. 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 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 it will take to implement such sweeping changes. Specific direction on some of the key policy issues that are identified in this report would aid the development of the code.

Second, a successor entity would be required to actually develop the statutory version of a consolidated land use code. Consideration should be given to the type of successor entity. It would need the funding, technical expertise, legislative drafting skills, and dedicated personnel to undertake such a task. A volunteer commission is limited in its ability to undertake actual statutory drafting of such sweeping changes. The possibilities for a successor entity include the Executive branch, a committee of the Legislature, or an existing agency. Whatever successor entity may be chosen, it is clear that the drafting of a consolidated land use code will be an enormous task requiring further public outreach and consensus building.

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

Establishment and Duties

The Land Use Study Commission was established by Ch. 347, Laws of 1995 (ESHB 1724). The 14-member Commission was established with the overall mission to “integrat[e] and consolidat[e]” ... the state’s land use and environmental laws into a single manageable statute.” RCW 90.61.010. In addition, the Commission was given a number of additional tasks, including:

1. Consider the effectiveness of state and local government efforts to consolidate and integrate the growth management act, the state environmental policy act, the shoreline management act, and other land use, planning, environmental, and permitting laws.

2. Identify the revisions and modifications needed in state land use, planning, and environmental law and practice to adequately plan for growth and achieve economically and environmentally sustainable development, to adequately assess environmental impacts of comprehensive plans, development regulations, and growth, and to reduce the time and cost of obtaining project permits.

3. 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.

4. Monitor local government consolidated permit procedures and the effectiveness of the timelines established by RCW 36.70B.090.

5. Evaluate funding mechanisms that will enable local governments to pay for and recover the costs of conducting integrated planning and environmental analysis.43

6. Study, in cooperation with the state board for registration of professional engineers and the state building code council, ways in which state agencies and local governments could authorize professionals with appropriate qualifications to certify a project’s compliance with certain state and local land use and environmental requirements.44

The legislation creating the Commission was effective June 1 1995. The Governor announced the appointment of the Commission members on September 28, 1995.

The Legislature has asked the Commission to submit a report to the Governor and the Legislature stating its findings, conclusions and recommendations not later than November 1 of each year.

43 The Commission’s 1996 report included the results of this study and made recommendations to the Governor and the Legislature for a continuation of state general funds for another two years.

44 The Commission’s 1996 Report addressed this issue and included a recommendation adopted as part of ESB 6094 in the 1997 Legislative session.
Appendix A

Membership

The Commission’s statute provides for up to 14 members, ten of whom are appointed by the Governor. The membership represents a cross-section of those interested in land use and environmental issues, including business, agriculture, labor, environmental and neighborhood activists, local and state governments, the tribes, and the general public. Three additional members are the directors of the Departments of Ecology, Transportation, and Community, Trade, and Economic Development (DCTED).

T. Ryan Durkan, of the Seattle law firm Hillis, Clark, Martin & Peterson, was appointed by Tim Douglas, Director of DCTED, as his designee and as chair of the Commission.

Other members of the panel appointed by the Governor, include: Kitsap County Commissioner Phil Best, of Bremerton; Spokane neighborhood activist Sheila Collins; Tom Campbell, President of SnoNet; Keith Dearborn, a landuse attorney in private practice in Seattle; Kathy Dietrich, a Vancouver architect; Loren Dunn, an environmental attorney with the Seattle law firm of Graham & James/Riddell Williams; Everett Mayor Ed Hansen; David Moseley, Ellensburg City Manager; Kimberly Ordon, a policy analyst for the Natural Resources Department of Tulalip Tribes in Marysville; and David Roseberry, a wheat farmer and former President of the Washington Association of Wheat Growers.

Tom Fitzsimmons, Director of the Department of Ecology, and James Toohey, Assistant Secretary with the Department of Transportation, represent their respective agencies.

1998 Meetings and Public Comment Opportunities

The Land Use Study Commission held meetings each month, except for June. In addition to its regular monthly meetings, the Commission held a special meeting January 20, 1998 to complete its 1997 report and legislative recommendations. The Commission provided a public comment opportunity at each of its meetings. In addition, it held two meetings, on November 3 and November 12, to solicit comment on its draft final report. A summary of the comments provided at those meetings is included in Appendix D.

1998 Legislative Session

The Commission’s 1997 Annual Report made four legislative recommendations. Three recommendations were passed by the Legislature and signed into law. One recommendation, extension of the Commission, did not pass the Legislature.

The three recommendations that were enacted concerned:

1. procedures for designating mineral resource lands, in response to the Governor’s veto of SHB 1472 from the 1997 Legislative session;
2. correcting drafting errors in annexation legislation recommended by the Commission and enacted by the Legislature in 1997; and

45 John Herrick, one of the original Commission members, representing the labor community, resigned in 1998. A replacement appointment was not made.
3. extending for two years the 120-day permit timeline adopted by the 1995 Legislature.

The recommendation for extension of the Commission was made in response to a request by the Senators McCaslin, Haugen, and Patterson on behalf of the Senate Committee on Government Operations.
Appendix B
Consolidated Land Use Code Factors

In developing the consolidated land use code, the Commission has been directed to take a number of factors into account. These factors include:

- Land use planning should be conducted through the GMA comprehensive planning process rather than through review of individual projects;
- Diverse sectors of the public should be involved in the planning process.
- Early and informal environmental analysis should be incorporated into planning and decision making;
- Recognize that different questions need to be answered and different levels of detail applied at each planning phase;
- Integrate and combine to the fullest extent possible the processes, analysis, and documents currently required under the GMA and SEPA, so that subsequent plan decisions and subsequent implementation will incorporate measures to promote the environmental, economic, and other goals and to mitigate undesirable or unintended adverse impacts on a community’s quality of life;
- Focus environmental review and the level of detail needed for different stages of plan and project decisions on the environmental considerations most relevant to that stage of the process;
- Avoid duplicating review that has occurred for plan decisions when specific projects are proposed;
- Use environmental review on projects to: (i) Review and document consistency with comprehensive plans and development regulations; (ii) provide prompt and coordinated review by agencies, tribes, and the public on compliance with applicable environmental laws and plans, including mitigation for site specific project impacts that have not been considered and addressed at the plan or development regulation level; and (iii) ensure accountability by local government to applicants and the public for requiring and implementing mitigation measures;
- Maintain or improve the quality of environmental analysis both for plan and for project decisions, while integrating these analyses with improved state and local planning and permitting processes;
- Examine existing land use and environmental permits for necessity and utility. To the extent possible, existing permits should be combined into fewer permits, assuring that the values and principles intended to be protected by those permits remain protected; and
- Consolidate local government appeal processes to allow a single appeal of permits at local government levels, a single state level administrative appeal, and a final judicial appeal.

RCW 90.61.040(4) (repealed effective June 30, 1998).
## Appendix C
### Volunteers

Many Washington citizens volunteered their time and energy to help the Land Use Study Commission. The dedication of these people has been instrumental in helping the Commission throughout its three years. The following is a list of those individuals.

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<td>Michelle Girts</td>
<td>Rob Odle</td>
<td>Dan Wood</td>
</tr>
<tr>
<td>Wendy Gross</td>
<td>Paul Parker</td>
<td>Barbara Yake</td>
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<tr>
<td>Jill Guernsey</td>
<td>Chris Parsons</td>
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<tr>
<td>Bill Hager</td>
<td>Mike Partridge</td>
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### Appendix D

**Summary of Public Comment on Draft Final Report**

<table>
<thead>
<tr>
<th>Public Comment – November 4, 1998</th>
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<tbody>
<tr>
<td><strong>Barbara Rudge</strong></td>
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</table>
| • Cities and counties and public and communities have had to absorb a lot over the last several years.  
  • A code consolidation might be a good idea over time, but not something that need to rush into.  
  • On appeals, have had some poor decisions from superior court judges. GMHBs have developed experience. Would like to stick with the status quo. It might be reasonable to go directly to Ct of Appeals rather than to superior court to get away from bias of local superior court judges. As an alternative to the land use court.  
  • Enforcement is an area that should be worked on now. Has not been handled well. Unlikely very many conditions will be carried out.  
  • Permitting fees to enforcement might be a way to provide some funding. |
| **Gerald Steele** |
| • Supports Barbara Rudge’s comments.  
  • Planning enabling statutes passed in 1960s, other land use laws passed between 1990-95. Not the time to make another overhaul to the system.  
  • People cannot take on another round of change.  
  • As a whole, report has a lot of good ideas that should be worked on, but not ready to be implemented.  
  • Part of report might be when to implement. Maybe ten years from now. Pass several years ahead of time to allow time to adjust.  
  • If you do a consolidated land use code, words will change.  
  • Can deal with some issues on a surgical basis. Enforcement is one.  
  • Some issues not addressed, such as prevailing party attorney fees under 4.84.270. Result of this 1995 change has been that there are no appeals, because no one can afford the risk of challenging. Counties and superior courts are ignoring the law because they know appeals are unlikely. Would like to see a change.  
  • Rural service definition do not include storm and sanitary sewer systems. Problem is that WACs by CTED include septic systems and drain fields. Need to clarify that. |
Public Comment – November 4, 1998

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<tr>
<td>Craig Ward</td>
<td>• Applaud effort to address several thorny issues.</td>
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<tr>
<td>SeaTac Principal</td>
<td>• SeaTac has several essential public facilities and that is focus of comments.</td>
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<tr>
<td>Long Range Planner</td>
<td>• Surgical amendments would be a better way to go. Frustrating as a local official</td>
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<td>to be constantly trying to keep up with annual changes to the statutes.</td>
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<td>• SeaTac does have a essential public facility siting process. Applied proposal</td>
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<td>to that process, and concluded that would essentially end up in negotiated process</td>
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<td>before intergovernmental coordinating council.</td>
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<td>• SeaTac starts with a process that takes a look impacts on adjacent jurisdictions</td>
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<td>and ends up with a conditional use permit.</td>
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<td>• Under proposal, any adjacent jurisdiction could take to negotiated process and</td>
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<td>eventually to binding arbitration. Opponents will take every opportunity to</td>
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<td>prolong. Will finally end up in court, which is where the conditional use permit</td>
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<td></td>
<td>ends up under SeaTac's current process.</td>
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<td></td>
<td>• This proposal needs to be thought through in more detail. Just taking responsibility</td>
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<td>away from local government and turning it over to another group is not a solution.</td>
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<tr>
<td>Rich Thorsten</td>
<td>• Appreciates work LUSC has done in the past.</td>
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<tr>
<td>1000 Friends of Wash.</td>
<td>• Legislature’s charge to do a consolidated land use code is overly ambitious.</td>
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<td>• Agree with previous speakers.</td>
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<td>• There are options for increasing integration of land use and environmental review.</td>
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<td>Should include recommendation for additional technical assistance.</td>
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<td>• Do not support changes to appeal process. Both SHB and GMHB are doing a good job.</td>
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<td>• One option that might make sense would be to give GMHB authority to hear permit</td>
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<td>issues.</td>
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<td></td>
<td>• Disappointed in results of vesting study. Believe additional work is needed and</td>
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<td>that there is a lack of data on which to base recommendations.</td>
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|Karen Terwilleger | DFW | • One reason a consolidated land use code is important is to look at outcomes of population growth. Looking at potential doubling of population by 2045. Also listing of a variety of species under ESA presents new problems.  
• Cannot stop growth or stop people at state borders.  
• Can look for tools to ensure both economic vitality and environmental protection.  
• Framework of land use laws, whether separately or as a consolidated land use code, is important.  
• State agencies look at state-wide interest, not state agency interest.  
• Local government look at costs of lost growth and dealing with growth.  
• Developers see problems in inefficient process.  
• Governance – shared governance is a good concept. Mixes different levels of government. Regional councils concept is being explored under watershed planning bills, aware of problems, but there is an opportunity to work with that.  
• Cabinet coordinating committee may not be appropriate for legislation. Concept is a good one.  
• Do have to have some planning at the state level and coordination between state and local governments.  
• SEPA process – now is not the time to make wholesale changes. Improvements can be addressed. No real guidance on how to deal with cumulative impacts.  
• SEPA does not equal GMA. SEPA is an analytical tool that goes beyond the GMA. Do not favor subsuming SEPA into the GMA.  
• Do favor coordinating SMA and GMA planning timelines. Do not believe there are problems with the SHB hearings process.  
• GMHBs will be dealing with changes to comprehensive plans in 2002. Best available science requirements will be in place at that time and may lead to an increased workload.  
• Enforcement is a key to success in dealing with land use and environmental issues. Should emphasize what do with monitoring and compliance requirements in permits. Look to outcome measures. Need to deal with funding issues. If local government does not get funding for enforcement, won’t see changes to practices.  
• Think the commission’s report can be a framework for changes in the future. |
## Public Comment – November 4, 1998

<table>
<thead>
<tr>
<th>David Ortman</th>
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<tr>
<td>• Have worked on land use, environmental issues for over 20 years.</td>
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<td>• Ironic that while commission claims to believe in encouraging public participation, it has issued a lengthy report with a minimal amount of time to comment.</td>
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<td>• Goal should be including environmental protection in all aspects of a land use code.</td>
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<td>• Do think idea of having one code is a good idea. Should add the ports to that mix.</td>
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<td>• Report has some biases, have slighted older statutes, such as clean water act. Have problems with not just allocation, but over allocation of water resources.</td>
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<td>• Can summarize consolidated land use code issues – predictability vs. flexibility and planning vs. permitting. But first thing that a developer does when code does not allow them to do something, is to either change the code or ask for flexibility.</td>
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<td>• Would like to see change in direction – certainty for environmental protection.</td>
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<td>• Would be helpful if there were some honesty about genesis of SMA and GMA, that they are developers’ versions of both of those statutes. Offered as weaker alternatives to stronger statutes proposed by environmental community.</td>
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<td>• Hydraulics, SMA, and GMA do not cover the same thing. Designed to address different issues.</td>
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<td>• Principles of coordinated decision making should include environmental protection. If are going to provide meaningful public comment, need to be clear that it is a right, not an opportunity that can be denied.</td>
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<td>• Should not be looking at throwing SMA out, but expand its principles to cover upland areas. Would rather rely on SMA and SEPA to guide us into the 21st century than on the GMA.</td>
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<td>• EFSEC is not a good model, since it does not address need. Needs to be a part of the process. GMA definition of essential public facilities is not adequate, too loose.</td>
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<td>• Discussions on SEPA imply that some ideas are not useful, such as alternatives. Disagrees with implication that SEPA is not conducive to good environmental review.</td>
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<td>• SHB process is a citizen enforcement opportunity. Was put in to allow a decision making process that was short of the courts. For that reason alone it should be kept.</td>
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<td>• Third party enforcement process should be looked at. Ecology does not now enforce requirements it imposes on water quality.</td>
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<td>• Vesting study – not enough data to come to conclusions in the report.</td>
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<td>• Conclusion should be: Emphasize environmental protection by maintaining SMA and SEPA, emphasize public participation, increase enforcement, be innovative. Look at planning special tools for dealing with planning in island counties</td>
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## Public Comment – November 4, 1998

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<th>Comments</th>
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| Maxine Keasling | - Should have been a press release to get more public comment.  
- Unacceptable to have cabinet committee that will become a virtual dictator over land use in the state.  
- Tribes and state are on the same side of issues – intergovernmental council is biased in their favor. |
| Stan Biles  
DNR | - Things have changed since 1724 and LUSC created – 300,000 additional people; new listings of threatened and endangered species.  
- Looked at report from perspective of whether would lead to enhancement and protection of natural resources.  
- Have concern that current level of environmental protection is inadequate. Any thing that would just maintain the status quo is not enough. Need to enhance environmental protection.  
- Costs to local government – need to look at total local government impacts, not just a narrow perspective of process costs – lost opportunity, economic ramifications from not doing anything.  
- Proposed SEPA changes – not sure now is the right time. Agree that need to get information up front. But do not close the door to late arriving information, such as cumulative impacts. Cumulative impacts are not well defined.  
- Options for hearings, agree with comment last month that SHB is not broken and does not need to be fixed. SHB serves an important role. Few appeals of SHB decisions to superior court.  
- If SHB is to be merged into another panel, de novo review needs to be maintained. Decision makers need to have all information.  
- Cabinet Coordinating Committee – can be accomplished without the need for legislation.  
- Enforcement – like attention to enforcement issues. Encourage expansion of 3rd party enforcement.  
- Essential public facility siting – definition in statute is too broad – should be more than just difficult to site. Oregon – 1980s statute – state agency made siting decision on landfill and provided for direct review to state supreme court.  
- There are some deep divisions on a number of land use and environmental issues. Encourage LUSC to communicate those divisions to the Governor and the Legislature. That in itself would be a service to the legislature and the governor. |
| Robert Cornish  
Senior Action Subcommittee of Legislative Committee of APA | - Favors regional planning.  
- Oregon’s planning process is light years ahead of where Washington is.  
- Agrees with need for new models of shared decision making. Missing element is regional governing processes.  
- Need to have some sort of authority to implement the regional approaches.  
- Was not aware of watershed planning process. Sounds as though it is moving the right direction. Local government will have to release some of their local control when issues are truly regional.  
- Agree that “stovepipe” concern needs to be dealt with. Regional planning process could address some of those issues.  
- A fourth option under planning would be to adopt watershed plans by a watershed agency. |
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| **Dave Williams** | • Cities have little enthusiasm for topics discussed in report.  
• Challenge for cities is how to implement and enforce the laws on the books. Will be emphasized as need to deal with ESA comes into focus.  
• Would like to look at enforcement and see if AWC can develop some creative ways to enforce what is already on the books.  
• Infrastructure continues to be important to cities.  
• Cities are not interested in shuffling land use statutes unless can make life better for citizens.  
• Even if don’t want to address the issues, they do need to be addressed and there is a need for a forum that has buy-in from the different interests.  
• On state coordination – there have been advances at state level, but there is still a disconnect between that and the budgeting process and capital budgets.  
• Revenue sharing is not likely to be supported. |
| **Connie Hoag** | • Concern about 3rd party lawsuit provision. Want to make sure that elected officials don’t default to that as the enforcement process. Could tie up the courts.  
• Governance – amount of agency involvement – should instead focus on providing technical assistance.  
• Encourage regional planning, but do not transfer power from local government to regional government  
• Do not know how the watershed planning process will work. A good concept, but need to see the results before model more things on it.  
• Give GMA more time to work. Overhauling GMHB is not a good idea.  
• Would rather have the GMHBs look at issues first, with their expertise, than go to the superior court.  
• Served on the mineral resource lands advisory committee. Thought that last year’s report did not fairly report the decision of the advisory committee. 97 annual report – says that recommendation was to develop a model ordinance. Left out that could be modified to accommodate local needs. Notice to adjacent property owners. Deed notice is not what was intended. Providing notice of intent to designate is what was intended to be included in the notice provisions. Because group was required to come up with consensus, did not take up a lot of good ideas. Would like to see the advisory committee reconvened or to have 97 report corrected to accurately reflect the Committee’s discussion. |
| **Joan Thomas** | • Helped work on the legislative alternative that put the SMA into law.  
• SMA is a partnership between local governments and state government.  
• Don’t wreck something that is working well.  
• Thought the advisory committee had agreed to a direct appeal to the court of appeals.  
• Need de novo review until local governments have ability to develop an adequate record.  
• Have not always agreed with SHB decisions, but do not want to see the process change.  
• State / local relationship has to be a partnership. The GMA should not serve as the model for the state/local relationship. |
| **Josh Baldi**  
*WEC* | • Watershed planning is an unproven concept. Too soon to rely on that model.  
• Support better coordinated state planning.  
• Recognize the need or interest in regional planning and flexibility. Look at model of SMA, that does allow some local flexibility.  
• Think can integrate SEPA and GMA without losing SEPA’s analytical tool. There are other statutes that need to be integrated as well, such as special purpose districts.  
• Fourth alternative for appeals – retain SHB and give it jurisdiction of other land use permits.  
• 3rd party suit provision – prevailing party costs too broad. Limit to plaintiff ala clean water act, civil rights act, metals mining act.  
• Funding is important to be dealt with.  
• Vesting – study addressed a very narrow set of circumstances and that there was limited data. Need to be careful about how the conclusion is summarized. |
| **Sophia Byrd**  
*Ikuna Masterson*  
*King County* | • Draft does not demonstrate that changes will simplify process or meet the standards it has set out.  
• Proposed changes to SEPA do not seem to further goals.  
• Although county generally supports more local control, somewhat skeptical of more levels of change.  
• Management board concept – may need to look at constitutional issues.  
• Should consider forwarding draft as a work in progress for DCTED and Ecology to look at further.  
• May not be the right time to make changes to SEPA, even though there may need to be changes.  
• Although SEPA is not perfect, have 20 years of case law that would be thrown open to court challenges and create uncertainty.  
• Had concerns that draft legislation on SEPA would not allow non-applicants to appeal environmental assessment.  
• Concern about the “front-loading” idea. A good idea in concept, but local government will have to pay for it.  
• If commission wants to explore these SEPA changes, should run through a model to see how they might play out.  
• 3rd party enforcement – county staff is intrigued by idea – county has adopted changes to its process and has hired additional code enforcement officers. Potential concern over liability.  
• Would like to see a forum that could take up this issue. Do not feel that this draft is at a stage that can support, but should be taken up by some other entity. |
## Public Comment – November 4, 1998

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<th>Name</th>
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| Chris Lehman, Coalition of  | • Does not agree that Commission has not had done considerable outreach.  
                                   | Washington Communities • Subcommittees of commission did not always meet those standards, such as mineral lands subcommittee.  
                                   | • Endorse notion that there should be strengthened enforcement. Failure to enforce engenders distrust of government on the part of citizens. Should probably stop issuing permits if cannot follow through.  
                                   | • Should add provision that an applicant would be denied a permit if consistently fails to obey permit conditions. Abatement should also be an option.  
                                   | • Enforcement should be a major focus and not lost among all of the other provisions.  
                                   | • In principle, cannot disagree with governance proposals. But without enough detail don’t know whether will result in gutting environmental review or cut out the public  
                                   | • SEPA and SMA were passed for specific reasons. Shorelines are special areas. SEPA provides a way of assessing project impacts. Use of MDNS is just a way to avoid EIS. Need to find a way around that.  
                                   | • Appeals are important way to correct mistakes and omissions in the administrative process. Do not want to see them cut back.  
                                   | • Report as whole makes the land use system seem entirely negative. There are some good features that should be recognized.  
                                   | • Siting – disagrees with statement that process drains away money for mitigation. Mitigation occurs because of the circuit breakers in the process that makes proponents deal with the process.  
                                   | • Don’t think LUSC has gotten any information that the siting process is not working. It is a messy process that should not be centralized. If are going to do something like this, do it on a case-by-case basis. |
| Sally Clarke                | • 3rd party enforcement – Should consider the potential problems  
                                   | • Many projects can have 25 – 100 conditions. Can be very specific, such as setbacks, to much more ambiguous. May rely on other development regulations.  
                                   | • Sometimes permit conditions rely on understood standards that are not fully explained in the permit.  
                                   | • Developer may be doing exactly what they have been told to do, but if someone does not like that or thinks county is wrong in its interpretation, could bring an action. Who would be responsible for attorney fees?  
                                   | • What would be impact on projects under construction?  
                                   | • Also can have conflicts between county and others. Developer is caught in the middle.  
                                   | • Developers have to make warranties to lenders that they are complying with the law. Might end up in having financing pulled even though county says are in compliance. Public projects would also be subject to these. |
| Marguerite Sutherland       | • Do not think the consolidated land use code changes sufficiently address fish issues.  
                                   | • Don’t change SHB or GMHB.  
                                   | • Support 3rd party enforcement concept. |

106 Land Use Study Commission Final Report  
December 1998
<table>
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<tr>
<th>Ann Aagaard</th>
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<td>• Do not think there is public consensus on consolidated land use code.</td>
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<td>• Have not demonstrated improvement to the environment.</td>
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<td>• Procedures for adoption of shoreline master programs. An inconsistency between different provisions in the report.</td>
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<td>• SMP includes both goals and policies and a preference for uses and development regulations to implement the goals and uses. GMA works differently. Write development regulations after adopt plan, at a later time. Would be a formidable task for Ecology to review in the GMA timelines.</td>
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<td>• Unclear whether proposal to eliminate SHB de novo review is an option for consideration or whether it is a recommendation.</td>
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<td>• De novo review integrates GMA, SMA, and SEPA through the review process.</td>
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<td>• SHB provides an opportunity to get one fair hearing in one place. Have developed expertise over the years and have established rules and procedures. Few decisions have been overturned on appeal to the courts.</td>
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<td>• Permits that come to the board involve complex issues. All parties expect the review that could be expected at the courts. Board has expertise in water quality, other areas that is important.</td>
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<td>• If this is such a great idea, how will it benefit fish?</td>
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<td>• Jim Tupper provided information to LUSC that showed only 5% of all shoreline permits are appealed to the SHB and 37% of those are dealt with through mediation.</td>
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<td>• Other options – unified hearings board – wouldn’t really be advantageous; state land use court – would have merit if kept SHB and sent all other land use issues to the court; court of appeals – any option that looks to an elected court to make land use issues should be looked at with skepticism. Not sure a good idea.</td>
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<td>• Enforcement – the attorney’s fees provisions in the proposal need to be examined closely. Would hope that project conditions are not ambiguous in the way Sally Clarke described.</td>
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Public Comment – November 12, 1998

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<tr>
<th>Jodi Walker</th>
<th>BIAW</th>
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<tr>
<td>BIAW represents over 7800 small business members in the building industry, most building between five and ten homes a year.</td>
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<tr>
<td>Disappointed that LUSC was unable to develop a consolidated land use code.</td>
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<td>Business community is interested in a consolidated land use code. Will streamline the system for permittees, provide better environmental protection, and save taxpayer dollars.</td>
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<td>Report needs to clearly lay out lack of consensus.</td>
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<td>Report should also place proposals in overall context of the consolidated land use code. Appeals section does a good job of laying out the pros and cons of the different options. A similar approach in other sections would assist future efforts at looking at these issues.</td>
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<td>The Commission should retain its approach to using the GMA as the integrating framework for the consolidated land use code.</td>
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<td>BIAW is concerned that the proposed intergovernmental coordinating council might take away local decision making.</td>
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<td>Support need for coordinating state agency actions, but hesitant to support a cabinet that might be given additional rule-making authority.</td>
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<td>Support concept of improving environmental review at planning stage. Report is confusing in its discussion of this topic.</td>
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<td>Have previously expressed concern about proposal from the SEPA Drafting Committee and its impact on small builders.</td>
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<td>Permit assistance center does not have much of an impact on small builders.</td>
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<td>Should add as a con to provision for state boards that they are not elected.</td>
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<td>Do not favor a unified hearings board for this reason. Do not favor bypassing superior court.</td>
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<td>Do support eliminating boards and having all cases go to superior court.</td>
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<td>Fact that superior court judges do not have land use experience is not significantly different from most other laws.</td>
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<td>State land use court is intriguing, but would politicize the court through the election process.</td>
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<td>Would like to sunset the GMHBs. They have resulted in strife between cities and counties and a loss of local control.</td>
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<td>Do support getting rid of de novo SHB review.</td>
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<td>Enforcement section is bare bones. Only minimal discussion of options. Given ramifications, more detail and better discussion is necessary. Some options, such as performance bonds, will result in increased costs and affect affordable housing.</td>
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<td>At last Commission meeting, discussion of whether 3rd party suit provisions apply during construction, or only post construction. Also concerned that will result in neighbor vs. neighbor suits. Difficulty with ambiguous conditions.</td>
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<td>Agree that funding of infrastructure is necessary. Do not support additional impact fees, or even impact fees currently in place. Unfair and not being used for purposes for which collected.</td>
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<td><strong>Public Comment – November 12, 1998</strong></td>
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<td><strong>Laura Kane</strong></td>
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<td>• Concerned that in consolidating codes, would lose protection of fish and wildlife and ability of citizens to participate in the process.</td>
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<td>• The GMHBs should be continued.</td>
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<td>• If SEPA is eliminated, would have less review of individual projects.</td>
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<td>• Do not object to local standards, unless they go against state standards that address regional or state interests. State needs to have a say in some areas that have more than a local impact.</td>
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<td>• Think can have an option between options of appointed and elected boards. Could have some of each.</td>
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<td>• Like the idea of 3rd party enforcement actions, but potential for award of attorney fees will be a disincentive to taking actions.</td>
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<td><strong>Don Stankey</strong></td>
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<td>• With respect to local control – have seen instances where county commission were compromised by developers, even though not in the best interest of the community.</td>
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<td>• Planning horizon should be more than 20 years, should be 90 years. Will see need to protect farmland now.</td>
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<td><strong>Carol Levanen</strong></td>
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<td><strong>Clark County Citizens United</strong></td>
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<td>• Pleased to see Commission is considering major changes.</td>
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<td>• Consolidation should not result in creating a super agency. Needs to result in a more efficient permitting process.</td>
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<td>• Would like to see permitting process encourage businesses to locate in Washington, not out of state. Do not want to encourage Clark county as a bedroom community of Portland metropolitan area.</td>
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<td>• CCCU believes GMHBs need to be changed. Excessive power given to the boards. Governor sanctions and courts are more appropriate venue. End up in duplication of costs because always end up in court. Support eliminating hearings boards and having all cases go to superior court. Do not want a single court. All cases should go local superior court.</td>
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<tr>
<td>• No changes to vesting are necessary.</td>
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<td><strong>Dave Robinson</strong></td>
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<td><strong>Kettle Range Conservation Concerned Friends of Ferry County</strong></td>
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<td>• Commission charge was overly ambitious.</td>
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<td>• Concerned that opening up the various statutes could result in problems</td>
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<td>• Do not support changes to the appeal process. Even though the process is slow, it does work.</td>
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<td><strong>Susanne Knapp</strong></td>
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<td><strong>Spokane Realtors and Builders</strong></td>
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<td>• Support comments of Clark County Citizens United.</td>
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<td>• Did not see private property rights as a value that are trying to protect as a part of the consolidated land use code.</td>
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<tr>
<td>• Support the idea of expedited permit process, but often difficult to achieve that through a consolidated process. Might be better to start with eliminating duplicative provisions as a way to address that problem.</td>
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| Scott Hazlegrove  
| AWB |  
|  
| • Appreciate attention commission has brought to a variety of issues and has been important in continuing discussion towards a consolidated land use code.  
| • AWB vision of a consolidated land use code – planning establishes policies and involves all parties, but ultimately decisions made by local government; project review should evaluate projects to determine if consistent with plans and if so should be expedited through a single decision making process that does not revisit prior decisions; and appeals through a single appeals process through superior court and subsequent judicial appeals.  
| • Do not believe legislation is necessary or appropriate at this time, because there is not consensus even on the basic issue of whether there is a need for a consolidated land use code.  
| • Does not believe a new forum to continue work on this issue is necessary because the discussion will take place informally through other processes. Do not need a process to resolve interagency disputes. Local governments should have prime decision making responsibility. State agencies or citizens would have ability to appeal those decisions.  
| • Cabinet coordinating committee is unnecessary. Managerial decisions best left to the executive authority. Do agree there is a need for the state to develop a single position.  
| • Do not support SMA recommendation because do not believe there should be a separate process for either shoreline planning or permitting. Proposal is not true integration.  
| • Local governments have to make permitting decisions that reflect compromises. Appeals should be available if parties believe law is not being followed. Do not support proposals which will saddle project applicant with need to do additional environmental review if project is consistent with comprehensive plan. Local governments should perform the environmental review at the planning stage.  
| • Proposal to eliminate threshold determination would result in burdening smaller projects and drive up costs, even though there may be some benefits for larger projects.  
| • Support concept of pilot project on consolidated permit. Commission has not given sufficient attention to the idea and laid out the idea in sufficient detail. More appropriate for further informal discussion, should not be included in commission report.  
| • Siting problems for essential public facilities is symptomatic of a permitting process that is broken and that would be fixed by a consolidated land use code. Providing special attention to essential public facilities is not justified. Resolving problems for all projects is more appropriate.  
| • The legislature is looking at reauthorizing the permit assistance center. Not really related to the consolidated land use code and has not received much attention from the Commission. Has not been an effective tool to date. Commission should not include in report since it is redundant to legislative oversight.  
|
| Scott Hazlegrove            | • A single unified appeal process should take place in the superior courts. Administrative boards will want to look at whether a local government made the correct decision. A court will focus on whether the local government follow the law and go through the correct process. Do support eliminating de novo review of shoreline permits, because it moves towards a unified code.  
• Would like Commission to clarify the enforcement issues should be limited to post construction enforcement. Most of examples were anecdotal. Need at least as much information as had for the vesting study before make any recommendations. There are enough alternatives already available.  
• Agree that funding for infrastructure is essential. Legislature funded a study last year. Do not believe that funding issues belong in the commissions report.  
• 3rd party enforcement should treat all parties equally. Plaintiff should be required to provide a bond in case it loses. Many disputes affect small landowners or small governments. Need to make sure that fees can be collected.  
• Local governments should have freedom on how to spend penalties and fines. The money now goes into the general fund. It is a local policy decision best left to local governments.  
• Commission’s value has been in bringing some issues forward. Discussion can continue informally. Adoption of a code is not likely to happen now. |
| Val Alexander               | • Prior to the GMA had a neighbor who tried to put a county road through her front yard and then built a light manufacturing plant 20 feet from the property line in a rural area. Incurred huge legal fees to deal with both of these.  
• Short EIS response time can be a problem.  
• Do not weaken structure of GMA. Allow time to evaluate its effects.  
• Should provide incentives to landowners to protect their resource lands.  
• Clark County is an example of the failure of local control. Infrastructure is not provided to deal with new development.  
• Support the GMHBs. If caseload drops off, should only consider making them part time positions. |

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<th>East Fork Hills Neighborhood Association</th>
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| John Karpinski              | • Have a salmon crisis in the state. Everything LUSC does should be in terms of salmon.  
                              | • Should not be talking about reducing SEPA. It is the only true enforcement system in place, particularly in Clark County.  
                              | • Do not see that there are a lot of problems with SMA. Should leave it alone.  
                              | • Philosophy behind consolidated land use code is that GMA is in place and its works. That is not true at least in Clark County. Things are a mess.  
                              | • Need to get the substance down first, before try to put all of the pieces together.  
                              | • Philosophy is mixed up – at times it is bottoms-up and at other times it is top-down. Should try to create a system that works for everyone and does the job. Don’t worry so much about whether it is state or local control.  
                              | • Support private sector enforcement of environmental laws. 3rd party enforcement would lead to effective enforcement.  
                              | • Impact fees are no where near enough to cover the costs of new development. Taxpayer dollars are going to subsidize growth. Impact fees should be proportional to the impact. Affordable housing raises the question of affordable for who. Much new housing is for people who are moving into the area, not for people who already live there. Have to make sure housing is affordable for our current senior citizens. Not the case if keep subsidizing new growth through property taxes.  
                              | • Appeals – do one of two things. Leave it alone or create something like the Oregon Land Use Board of Appeals. Keep politics out of the process through appointment, not election. If need to conduct fact finding, continue the SHB. Get superior courts out of land use business. Judges admit they do not like land use cases. |
| Bill Clark                  | • A lot of people support the vision of a consolidated land use code, but do not believe a consensus on the code is there.  
                              | • Would like to see a single permit, a single process, and a single appeal.  
                              | • Do not think there is a need for a formal process to continue discussion of a land use code in the future.  
                              | • Do like the idea of a pilot project to look at a integrated permit, but need more detail to see how it would work.  
                              | • A lot of other enforcement options are already available. Should look at why have not been more broadly adopted.  
<pre><code>                          | • Concerned about 3rd party enforcement proposal. This could affect subsequent purchasers who may be sued for something that the builder should have done. Will have a impact on affordable housing. |
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<p>| Washington Association of Realtors |                                                                         |</p>
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<tr>
<th>Name</th>
<th>Comments</th>
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<tr>
<td>Paul Parker</td>
<td>• WSAC has never been a primary advocate for a consolidated land use code. Have always had concerns about its impacts and the motivations for it.</td>
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<td>Washington State</td>
<td>• Do understand the need to address some of the issues it attempts to address, particularly around the permit process.</td>
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<td>Association of Counties</td>
<td>• Statutes the commission has identified are the right ones.</td>
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<td>• Many counties are still absorbed in completing and implementing their GMA programs. ESA listings have also occupied attention of many local governments.</td>
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<td>• Some minor questions: what will be impact on local governments in terms of need to revise and reprint their own codes.</td>
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<td>• Integrating the planning enabling acts is a good idea and would like to move forward on that in the next year or two.</td>
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<td>• SMA integration continues to be a concern. Counties are not satisfied with the Shorelines Guidelines Commission process being handled by Ecology.</td>
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<td>• Would like to continue work on eliminating duplicative environmental review. Also agree that there would be value in establishing minimum standards for local administrative hearings.</td>
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<td>• Appeals – county association has members that would support all of the options listed.</td>
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<td>• Funding issues do need to be addressed.</td>
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<td>Marilyn Rhenquist</td>
<td>• It is important for the government to stand firm in protecting the environment.</td>
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<td>• Understand how difficult it is in the face of economic concerns.</td>
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<td>• Should put more teeth into laws.</td>
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<td>• Traffic is getting worse.</td>
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<td>David McDonald</td>
<td>• Concept of consolidated land use code is a good concept. Environmental interests end up having to split time and go through duplicate proceedings.</td>
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<td>• Concern is that there has been tinkering with the GMA that has generally made it less protective.</td>
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<td>• A more detailed proposal is necessary for review.</td>
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<td>• Need to be careful about how do consolidation. Integration of SMA plans with the GMA has created confusion, with some believing the purpose was to provide greater protection and others believing that you cannot change a shoreline plan without changing a lot of other local provisions as well.</td>
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<td>• Vesting laws need to be changed if are going to make other changes. Washington law is too generous. Should not vest until have gone through the environmental review process.</td>
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<td>• Judicial review – it has been extremely difficult to educate county officials about land use. It is easy to overwhelm them with the volume of materials. A specialty board would have the expertise to deal with the issues. Keep local voice by having initial decision made by a local hearing examiner.</td>
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<td>• Do not see that consolidation of boards would result in that much efficiency, since would still need the same number of board members to make decisions.</td>
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Appendix E
Comment Letters on Draft Final Report

The following are the comment letters received by the Commission on its Draft Final Report.