

# ***The Evolution of Growth Management in Washington: 25 Years and Counting***

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Twenty-five years after its passage, it is appropriate to take stock of both the successes and shortcomings of the Growth Management Act.<sup>1</sup> This paper will briefly describe the evolution of growth management in Washington from the enactment of HB 2929 in 1990 through a brief description and analysis of significant case law and administrative decisions.

## **I. THE GROWTH MANAGEMENT ACT.**

### *Beginnings.*

Planning and zoning authority is a governmental responsibility managed in Washington, and in almost every other state, primarily at the local level. State government's involvement in planning usually involves state-owned or state-managed resources<sup>2</sup> or a state response to a federal mandate.<sup>3</sup> Zoning and land use regulation

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The views expressed in this paper are his own and not intended to represent the views of his employer.

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<sup>1</sup> Codified primarily in Chapter 36.70A RCW and at Chapter 47.80 RCW (GMA transportation elements).

<sup>2</sup> See *e.g.*, State Trails Plan, RCW 67.32.050; Natural Heritage Plan, RCW 79.70.030.

<sup>3</sup> The Coastal Zone Management Act (CZMA) of 1972, 16 U.S.C.A. section 1451 *et seq.*, is one example. California and North Carolina are among the states that have enacted comprehensive shoreline legislation in response to the CZMA. Other states, such as Florida, meet the CZMA obligation through an existing network of laws. DONNA CHRISTIE, and RICHARD HILDRETH, Coastal and Ocean Management Law, 2d ed. at 67, West (1999).

nearly always is a local matter, although beginning in the 1970s several states included a state role.<sup>4</sup>

The Legislature enacted Washington's Growth Management Act (GMA) in a special legislative session on April 1, 1990, following a lengthy process led by the Growth Strategies Commission.<sup>5</sup> Motivated by a number of factors, including rapid suburban development and stifling congestion in the Seattle region, the resulting decrease of farmland and open space in Central Puget Sound, the fall 1989 election of slow-growth candidates in King and Snohomish County, and Keep Washington Livable -- an environmental initiative filed only days before passage of HB 2929 -- the enactment of HB 2929 set forth 13 state-wide goals, numerous new policies and requirements, and new planning and revenue authorities for counties and cities.

HB 2929 required counties with high growth rates to plan and also allowed counties to opt into the GMA planning regimen.<sup>6</sup> Once a county committed to planning under GMA, it could not change its mind and withdraw.<sup>7</sup> A city must follow the lead of the

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<sup>4</sup> Hawaii has statewide zoning. HAWAII REV STAT. sections 205-1 to 205-37. Vermont and Oregon also include a significant state role in planning and zoning. For an excellent overview of state involvement in land use planning, see PETER A. BUCHSBAUM and LARRY J. SMITH, State and Regional Comprehensive Planning, American Bar Association (1993).

<sup>5</sup> 1990 Wash. Laws 1<sup>st</sup> Ex. Sess. 1972, Ch. 17, largely codified as Chapter 36.70A RCW. A Governor-appointed Growth Strategies Commission was more than halfway through its work when the Legislature enacted HB 2929 in spring 1990. For political and legislative background leading up to enactment of GMA, see Settle & Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867, 869-892 (1993).

<sup>6</sup> Another 10 counties -- Benton, Columbia, Douglas, Ferry, Franklin, Garfield, Kittitas, Pacific, and Pend Oreille, Walla Walla chose to plan under GMA by the end of 1990. Grant County met the population threshold in 1992, Lewis and Spokane Counties met the population thresholds in June 1993. Stevens County opted in to GMA planning in 1993.

<sup>7</sup> Skamania County has experienced a growth rate that would require it to plan under GMA, but took advantage of the escape provision that allows a county under a certain population to remove itself from the planning requirements of the Act. Even home rule counties that allow voter initiative and referendum cannot be removed by voter action from GMA requirements. Until 2014, legislative efforts to allow smaller population or low population density counties to remove themselves from the Act have failed all but once -- and that effort was vetoed by the Governor.

EHB 1224, enacted by the 2014 Legislature temporarily allows counties with a population under 20,000 to opt-out of full GMA planning. See RCW 36.70A.040 (2)(b)(i). Four counties meet the criteria: Columbia, Ferry, Garfield and Pend Oreille. At this time, Ferry County is the only county that has entered the voluntary reversion process.

county in which it is located and plan under GMA – even if part of the city lies within a non-GMA county.<sup>8</sup>

GMA-planning<sup>9</sup> counties and cities are required to develop and adopt comprehensive plans, followed by zoning and other development regulations to implement those plans. Unlike those in Oregon, the local plans and regulations adopted in Washington are effective upon adoption.

In their early summary of GMA and its future prospects, Settle and Gavigan identified four key purposes of the Act: (1) avoiding sprawl by concentrating new development in urban growth areas; (2) ensuring adequate public facilities for that development through infrastructure that is planned and built concurrent with new development; (3) protecting environmentally critical areas from harm and conserving agricultural, forest and mineral lands by directing development elsewhere; (4) and coordinating local plans and regulations regionally to ensure fair and efficient allocation of locally undesirable but regionally essential facilities, while compelling state compliance with local plans and regulations.<sup>10</sup> These four key purposes have held up well over time.

In this paper, based on review of nearly 25 years of growth board decisions and case law, I identify five fundamental precepts or goals of GMA<sup>11</sup> and briefly trace their evolution from HB 2929 to current case law. The five precepts, in no priority order are:

- Focus new growth and development in designated urban growth areas
- Keep rural areas rural
- Critical infrastructure should keep pace with development
- Protect resource lands and the natural environment
- Respect regional differences and provide cities and counties a variety of ways to accomplish the four goals above

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<sup>8</sup> The City of Woodland lies mostly in Cowlitz County, which is not planning under GMA, and partly in Clark County, which is. An Attorney General opinion concluded that the entire city of Woodland must plan under the Act.

<sup>9</sup> When using “GMA-planning” as an adjective, this paper refers to those counties and cities that, due to size, growth rate, or their own choice, are required to comply fully with the requirements of the Act, as compared to the 10 counties and cities within that must only take action to protect critical areas and designate resource lands.

<sup>10</sup> Settle & Gavigan, *supra* note 5, at 904-05.

<sup>11</sup> GMA, as conceived and written, includes many other important goals, not the least of which are economic development and housing. To date, the five organizing precepts of this paper, in the opinion of this author, have been the focus of local action and litigation, rather than other goals, both explicit and implicit.

## *HB 2929 and Its Immediate Aftermath*

Consistent with Washington's historic "bottom-up" approach to land use planning, HB 2929 lacked enforcement mechanisms and cross-jurisdictional coordination. Instead, Washington's is a "bottom-up" growth management scheme for those counties, and the cities within them, that meet specific population or growth rate requirements.<sup>12</sup>

Other than establishing planning goals and requirements in statute and providing financial and technical assistance to GMA-planning jurisdictions, the state role in HB 2929 was minimal. The initial 1990 legislation did not include any enforcement mechanism to ensure that the planning objectives and requirements actually were met. HB 2929 also fell short of the environmental community goal – included in Initiative 547 -- to have wetlands and other "critical areas" protected statewide.<sup>13</sup>

The environmental community lamented the lack of state oversight and enforcement in HB 2929, and its failure to ensure protection for resource lands and environmentally sensitive areas. Community leaders lacked assurance that the infrastructure necessary to accommodate growth and economic development could move forward in a world of "not-in-my-back-yard" attitudes.

Partly to address these shortcomings, which the Growth Strategies Commission would address in its recommendations, but also in response to the environmental community's Initiative 547,<sup>14</sup> the Governor, the Legislature, counties, cities and the development

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<sup>12</sup> When first enacted, GMA applied to 13 Western Washington counties and the cities within them. Population growth tabulated prior to legislative adoption, but not effective until July 1, 1990, added the eastern Washington counties of Chelan and Yakima as mandated GMA-planning counties. Three counties – Jefferson, Mason and San Juan – could have removed themselves from GMA when met the population growth rate requirement but chose to remain as GMA-planning counties.

<sup>13</sup> Designation and protection of critical areas in non-GMA planning counties and cities was added as an amendment to RCW 36.70A.060.

<sup>14</sup> Initiative 547, *Keep Washington Livable*, proposed a growth management structure similar to the Oregon model, requiring the full participation of every county and city in the state and state approval of county and city growth management plans and regulations.

Signature gathering for Initiative 547 was not the first step in bringing growth management planning to Washington. Despite the legislature's quick response to the proposed Initiative, the Washington Environmental Council continued to collect signatures and placed Initiative 547 on the November 1990 ballot.

community promised to complete the legislative work begun by HB 2929 and enact legislation in 1991 to implement the remaining recommendations and include an enforcement mechanism – if the people defeated Initiative 547 on the November 1990 ballot.

Governor Booth Gardner, legislative leadership from both parties in the House and the Senate, local government associations and key business associations all opposed Initiative 547 but committed to work toward passage of legislation in the 1991 session to address enforcement and enhanced environmental protection.<sup>15</sup> Shortly after the defeat of the Initiative, Governor Gardner released draft legislation fulfilling his commitment, based substantially on the recommendations in the Final Report of the Growth Strategies Commission.<sup>16</sup>

After several special sessions, the 1991 Legislature kept the promise its leadership made the previous summer and enacted HB 1025, also known as “GMA II.”<sup>17</sup> That legislation primarily established oversight and enforcement mechanisms, but it also included some useful planning and development authorities.

For oversight, it established three Growth Management Hearings Boards (GMHBs) as regional quasi-judicial review panels to consider challenges to county and city plans and regulations.<sup>18</sup> Appeals of development decisions or denials made pursuant to GMA plans and regulations would continue to be made in Superior Court. GMA II also established a variety of sanctions and penalties for failure to comply with requirements of the Act. The most severe – withholding state revenues -- are imposed by the Governor; others take effect automatically when a jurisdiction is out of compliance.<sup>19</sup>

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<sup>15</sup> Excellent summaries of the legislative history of GMA II can be found in Settle & Gavigan, *supra* note 5, at 892-96 and in McGee, *Washington’s Way: Dispersed Enforcement of Growth Management Controls and the Crucial Role of NGOs*, 31 SEATTLE U. L. REV. 1 (2007).

<sup>16</sup> *A Growth Strategy for Washington State: Final Report of the Growth Strategies Commission*, (September 25, 1990).

<sup>17</sup> 1991 Wash. Laws 1<sup>st</sup> Sp. Sess., Ch.32.

<sup>18</sup> RCW 36.70A.260 - .280. A Central Puget Sound Board heard challenges to comprehensive plans and development regulations from King, Kitsap, Pierce and Snohomish Counties and the cities within them. The Western Washington Board heard challenges from all other GMA-planning counties and cities west of the Cascade Crest and the Eastern Washington Board heard challenges from all GMA-planning counties and cities east of the Cascade Crest. In 2010, the three boards were merged into one.

<sup>19</sup> See RCW 36.70A.340 - .345. More than the threat of sanctions, the effective penalties that have spurred a county or city to action have been loss of eligibility for certain state grants and loans triggered by

GMA II also expanded to all counties and cities the requirement to protect critical areas.<sup>20</sup> It authorized “new fully contained communities”<sup>21</sup> and “master-planned resorts”<sup>22</sup> as allowable growth outside urban growth areas. And, it required each GMA-planning county and city to establish a process to ensure that “essential public facilities” can be sited.<sup>23</sup>

Finally, GMA II addressed some governance-related planning issues. It recognized counties as regional governments within their boundaries and expanded the regional responsibilities that GMA assigned to county government by directing development of county-wide planning policies to coordinate and guide the individual county and city plans within each GMA county.<sup>24</sup> GMA II also directed that a multi-county planning policy be developed for the three county urban area surrounding Seattle.

## II. THE EVOLUTION OF GROWTH MANAGEMENT IN WASHINGTON

At a minimum, GMA comprehensive plans must include the following six elements<sup>25</sup>:

- Land use
- Transportation
- Capital facilities
- Housing
- Utilities
- Rural

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noncompliance and plan invalidation. Eligibility for the public works assistance account, RCW 43.155.070 and the centennial clean water account, RCW 70.146.070 require a county or city to have a comprehensive plan and development regulations that meet current law. A determination of invalidity prevents development proposals from vesting under the rejected plan or regulation. See Settle, *Washington’s Growth Management Revolution Goes to Court*, 23 SEATTLE U. L. REV. 5, 44-45 (1999).

<sup>20</sup> 1991 Wash. Laws 1<sup>st</sup> Sp. Sess., ch.32., section 21, *codified at* RCW 36.70A.060(2).

<sup>21</sup> 1991 Wash. Laws 1<sup>st</sup> Sp. Sess., ch.32., section 16, *codified at* RCW 36.70A.350.

<sup>22</sup> 1991 Wash. Laws 1<sup>st</sup> Sp. Sess., ch.32., section 17, *codified at* RCW 36.70A.360.

<sup>23</sup> 1991 Wash. Laws 1<sup>st</sup> Sp. Sess., ch.32., section 1, *codified at* RCW 36.70A.200.

<sup>24</sup> 1991 Wash. Laws 1<sup>st</sup> Sp. Sess., ch.32., section 21, *codified at* RCW 36.70A.210.

<sup>25</sup> Optional elements may be included. In 2003, the legislature required two additional elements – economic development and parks and recreation -- that must be included if funding is provided.

These six elements are to mesh within each comprehensive plan -- and the plan of a county and the cities within that county are to be coordinated, as are the plans of cities adjacent to each other. Comprehensive plans must then be implemented by a set of development regulations.<sup>26</sup> The idea was to elevate planning by tying it together with zoning and other regulations.<sup>27</sup>

In addition to adopting and implementing comprehensive plans, GMA-planning counties and cities have environmental responsibilities, somewhat similar to requirements of the Shoreline Management Act, which was enacted by initiative in 1971.<sup>28</sup> GMA required all counties and cities to designate and protect “critical areas.”<sup>29</sup> It also required GMA-planning counties and cities to designate and conserve natural resource lands.<sup>30</sup>

While patches of the state remain without planning and zoning,<sup>31</sup> the residents of twenty-nine of the state’s counties – representing about 95% of the population – now live in GMA-planning counties and cities. Every one of these counties and cities have established county-wide planning policies, designated and protected critical areas

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<sup>26</sup> RCW 36.70A.040.

<sup>27</sup> In *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997), the first GMA case decided by the Washington Supreme Court, the Court dealt a body blow to consistency between the plan and regulations, characterizing the comprehensive plan as only a “guide” or a “blueprint.”

<sup>28</sup> Chapter 90.58 RCW.

<sup>29</sup> “Critical areas” are defined in RCW 36.70A.060 as:

- ◆ Wetlands
- ◆ Frequently flooded areas
- ◆ Fish and wildlife habitat areas
- ◆ Critical aquifer recharge areas
- ◆ Geologically hazardous areas

<sup>30</sup> RCW 36.70A.060.

<sup>31</sup> Okanogan County, the county with the largest land area in the state, is one of several that do not have a zoning code. While most of the 10 counties not planning under GMA lack countywide zoning, several have comprehensive plans and some are partially zoned. Whitman County has long been noted for its stringent agricultural zoning. Klickitat and Skamania Counties are subject to comprehensive land use planning very similar to that mandated by GMA, pursuant to the 1986 Columbia Gorge National Scenic Area, 16 U.S.C. section 544 *et seq.*

within its jurisdictional boundaries, and drawn urban growth areas planned to accommodate within them most of the state's projected 20-year growth.

However, as Professor Settle noted and as history has demonstrated, GMA requirements are mostly procedural.<sup>32</sup> The Washington Supreme Court has upheld GMA's procedural emphasis, writing that "GMA, while providing some substantive requirements ... mandate[s] above all that [counties and cities] engage in a deliberative process ... ." <sup>33</sup> That deliberative process leads, in turn, to broad local discretion for *how* a county or city chooses to implement the Act:

[D]eference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and the courts to administrative bodies in general. (citations omitted)<sup>34</sup>

By driving process more than specific outcomes -- as an integrated program to curb sprawl and better plan for future growth in the face of population pressures -- GMA might be considered a major success. Since enactment of GMA, the percentage of state population living in cities has steadily increased.<sup>35</sup> And public involvement in comprehensive planning is intense.<sup>36</sup>

But outcomes matter, too. GMA critics from the environmental and smart growth<sup>37</sup> side of the argument assert that urban growth areas are so big that urban sprawl has shifted

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<sup>32</sup> "An obvious implicit promise of the GMA is that process requirements produce substantive rewards." Settle & Gavigan, *supra* note 5, at 905.

<sup>33</sup> *Quadrant Corp. v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005).

<sup>34</sup> *Quadrant Corp.*, *supra*, 154 Wn.2d at 238.

<sup>35</sup> Most of the population growth during the 1980s was in unincorporated areas. Pivo & Lidman, *Growth in Washington: A Chartbook*, Washington Institute for Public Policy (January 1990). This trend has flipped and today 65% of the state's population lives in cities. *April 1 Population of Cities Towns, and Counties*, Office of Financial Management, Forecasting Division (June 2015).

<sup>36</sup> See McGee, *Washington's Way: Dispersed Enforcement of Growth Management Controls and the Crucial Role of NGOs*, 31 SEATTLE U. L. REV. 1 (2007).

<sup>37</sup> "Smart Growth" is the American Planning Association 1990s-era addition to the planning vocabulary. Meck, *Present at the Creation: A Personal Account of the APA Growing Smart<sup>SM</sup> Project*, 3 LAND USE LAW AND ZONING DIG. 3 (March 2002). One commentator distinguishes "smart growth" from "growth management" suggesting that smart growth places more decisionmaking authority with local governments and leaves the state in the position of technical assistance and fiscal support. Pollard, *Smart*



from being a failure of county government to being sanctioned city gluttony for growth; that critical areas are not adequately protected; and that county-wide planning policies are mere planning exercises that have replaced comprehensive plans as shelf art. Farmers, economic development specialists, and advocates for affordable housing assert, on the other hand, that efforts to protect critical areas have hurt agriculture by taking land out of production and preventing use of affordable farming practices; that tightly drawn urban growth areas drive up the cost of land so much that developers cannot afford to build starter homes; and that businesses have no room to grow and expand.

The next five sections will explore evolution of GMA in cases brought before the Growth Management Hearings Boards and the courts. Guidance, direction and comment by the state on development of GMA plans and regulations have certainly shaped decisions by counties and cities. But the nearly constant tug on county and city elected officials and planning staff regarding interpretation and implementation of GMA has come from the environmental and developmental communities.

The push and pull of advocates for development or environmental protection has generated most of the GMA litigation. While there have been numerous state agency appeals, many of which have focused on failure to accommodate “essential public facilities”, urban growth boundaries drawn too large, and inadequate regulations adopted to protect “critical areas” or natural resource lands, the drafters of the Act should be pleased with the minimal impact of state government on GMA implementation.<sup>38</sup>

#### *A. Focus new growth and development in designated urban growth areas*

Considering that sprawl was a major force behind the enactment of GMA, perhaps the key aspect of the Act is the mandate to establish “urban growth areas.”<sup>39</sup> Most future

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*Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247 (2000). Using the phrase offers the promise that comprehensive planning is “smart” without the stigma of government “managing” private development.

<sup>38</sup> Although state agencies have challenged local plans and regulations on numerous occasions, the Governor has imposed fiscal sanctions only once. Those sanctions, imposed by Governor Lowry against Chelan County, were rescinded by the Governor shortly before he left office, following the election of two county commissioners who promised to uphold GMA.

<sup>39</sup> RCW 36.70A.110.

growth should take place within urban growth areas that have “urban governmental services.”<sup>40</sup> Only development that is “not urban in nature” may occur outside of a designated urban growth area (UGA). To complete the GMA vision, open space corridors, including rural and resource lands, are to separate urban growth areas.<sup>41</sup>

Counties, working in collaboration with their cities, have the key responsibility for framing these transboundary relationships.<sup>42</sup> Rather than create a regional level of government, or assign regional responsibilities to the state, the Legislature – as it has in the past<sup>43</sup> -- assigned this regional role to county government. It is the county that must allocate the projected future population growth between UGAs and rural areas, designate the boundaries of the UGAs within the county, and adopt county-wide planning policies to coordinate the comprehensive plans of the county and its cities.<sup>44</sup>

The courts have acknowledged this regional responsibility in many ways. They have recognized the binding effect of countywide planning policies.<sup>45</sup> And, in preventing conversion of agricultural lands to urban uses, the Central Puget Sound Hearings Board has deemed the multi-county planning policies to be binding as well.<sup>46</sup>

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<sup>40</sup> “‘Urban governmental services’ or ‘urban services’ include those public services and public facilities at an intensity historically and typically provided in cities, specifically including storm and sanitary sewer systems, domestic water systems, street cleaning services, fire and police protection services, public transit services, and other public utilities associated with urban areas and normally not associated with rural areas.” RCW 36.70A.030(20).

<sup>41</sup> RCW 36.70A.160.

<sup>42</sup> RCW 36.70A.210.

<sup>43</sup> As subdivisions of the state, counties in Washington have primary responsibility for local administration of criminal justice, local public health, property assessment, and elections, amongst other responsibilities.

<sup>44</sup> John DeGrove, one of the experts on growth management nationally, considers Washington’s GMA statute the best at county-wide and regional coordination. Speech at American Planning Association Conference, San Francisco (April 1992).

<sup>45</sup> *King County v Central Puget Sound Growth Management Hearings Board*, 138 Wn.2d 161, 979 P.2d 374 (1999).

<sup>46</sup> *Friends of Pierce County v. Pierce Co.*, CPSGMHB No. 12-3-0002c (July 9, 2012).

While the designation of UGAs has been contentious across the state, counties have great discretion in making choices about how to accommodate growth.<sup>47</sup> The sizing of a UGA must not exceed the amount of land necessary to support the urban growth forecasted by the Office of Financial Management (OFM), plus a reasonable land market supply factor reflecting local circumstances.<sup>48</sup>

Courts have granted so much discretion to counties that Division Two of the Court of Appeals has limited application of the OFM population forecast to the UGA allocation; the forecast cannot be used to limit growth outside the UGA.<sup>49</sup> And, while coordinated planning in the unincorporated UGA is strongly encouraged, “joint city-county planning is not required and the GMHB cannot impose it as a GMA requirement.”<sup>50</sup> Likewise, Growth Boards have recently approved Island County’s decision to avoid using the latest population projections in its refusal to enlarge Oak Harbor’s UGA<sup>51</sup> and Jefferson County’s Irondale UGA from a challenge of inadequate capital facilities.<sup>52</sup> County discretion is not limitless, however. Spokane County failed in an attempt to increase UGA population by 7,500 without any evidence of public participation.<sup>53</sup>

### *B. Keep rural areas rural*

Many GMA battles have been fought over rural character. The leading case is Kittitas County v. Eastern Washington Growth Management Hearings Board,<sup>54</sup> in which the Supreme Court largely upheld a Growth Board decision finding that Kittitas County

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<sup>47</sup> Thurston County v. Western Washington Growth Management Hearings Board, 164 Wn.2d 329, 190 P.3d 38 (2008).

<sup>48</sup> Thurston County v. Western Washington Growth Management Hearings Board, *supra*.

<sup>49</sup> Clark County Natural Resources Council v. Clark Co., 94 Wn.App. 670, 972 P.2d 941 (1999).

<sup>50</sup> Spokane County v. City of Spokane, 148 Wn.App. 680, 279 P.3d 1228 (2009).

<sup>51</sup> Oak Harbor v. Island County, WWGMHB No. 11-2-0005c (December 12, 2011).

<sup>52</sup> Irondale Community Action Council v. Jefferson County, WWGMHB No. 07-2-0012c (August 12, 2009) (sewer service availability within the 20-year planning horizon is adequate; guarantee of connections in place is not necessary).

<sup>53</sup> Neighborhood Alliance of Spokane County v. Spokane County, EWGMHB No. 13-1-0006 (November 26, 2013).

<sup>54</sup> 172 Wn.2d 144, 256 P.3d 1193 (2011).

failed to include provisions to protect rural areas, provide for a variety of rural densities, protect agricultural land, and protect water resources.<sup>55</sup> The majority opinion acknowledges that a county may define and protect rural areas in many different ways, but “where a county, in its discretion, *opts* to designate land as part of its rural element, it must protect the character of the land as required by RCW 36.70A.070 (5)(c).” Here, inadequate rural density and development provisions failed to protect rural character.

Many other challenges involving rural areas have focused on the scope and application of RCW 36.70A.070 (5)(d), allowing “limited areas of more intensive rural development” (LAMIRD) which existed on July 1, 1990, the effective date of GMA. Counties must adopt measures to minimize and contain existing areas or uses of more intensive rural development, whether shoreline development, villages, hamlets, rural activity centers, or crossroads developments.<sup>56</sup>

Growth Boards have been diligent in their review of LAMIRDs, focusing on keeping the intensive land use in an otherwise rural area within “a logical outer boundary”<sup>57</sup> and limiting new uses within the LAMIRD.<sup>58</sup>

### *C. Critical infrastructure should keep pace with development*

A key underlying assumption of GMA is that the basic infrastructure for development – water supply, wastewater, roads, schools and parks – will be cheaper to build and better fit community needs if it is planned for before new growth occurs.

Jurisdictions are required to designate level of service (LOS) standards for transportation facilities.<sup>59</sup> The purpose is to regulate the timing and location of development in an orderly way.<sup>60</sup>

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<sup>55</sup> See Section C. *Critical infrastructure should keep pace with development, infra*, for discussion of the water resources portion of Kittitas.

<sup>56</sup> *Gold Star Resorts v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009).

<sup>57</sup> See, e.g., *Burrow v. Port Gamble*, CPSPGMHB No. 99-3-0018 (March 29, 2000).

<sup>58</sup> See, e.g., *Panesko v. Lewis County*, WWGMHB 00-2-0031c (March 5, 2001).

<sup>59</sup> *City of Bellevue v. East Bellevue Community Municipal Corporation*, 119 Wn.App. 405, 81 P.3d 148 (2003).

<sup>60</sup> *Sammamish Community Council v. City of Bellevue*, 108 Wn.App. 46, 29 P.3d 728 (2001).

It is optional for counties and cities to designate LOS for other capital facilities or services. But once standards are set, they must be followed. Development applications in rural Whatcom County were improperly approved, the Court held, without required letters from the relevant fire district that it had adequate fire protection capacity for new development.<sup>61</sup>

Growth Boards and courts have been especially strict with regional infrastructure and essential public facilities.<sup>62</sup> No local comprehensive plan or development regulation may preclude the siting of essential public facilities.<sup>63</sup>

Regional planning trumps conflicting local ordinances, especially when regionwide transportation infrastructure is at stake. Beginning with Des Moines v. Puget Sound Regional Council,<sup>64</sup> boards and courts have rejected planning decisions by “balkanized fiefdoms” in order to move ahead with key infrastructure improvements, in this case the construction of a third runway at SeaTac International Airport by the Port of Seattle. Similarly, the capital facilities element<sup>65</sup> and the utilities element<sup>66</sup> required in GMA comprehensive plans are tools to ensure that planning for future growth addresses

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<sup>61</sup> Whatcom County Fire District No. 21 v. Whatcom County, 171 Wn.2d 421, 256 P.3d 295 (2011).

<sup>62</sup> RCW 36.70A.200 (1) 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 as defined in RCW [47.06.140](#), regional transit authority facilities as defined in RCW [81.112.020](#), state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in RCW [71.09.020](#).”

See Department of Corrections v. City of Lakewood, CPSGMHB No. 05-3-0043c (January 31, 2006); Port of Shelton v. City of Shelton, WWGMHB No. 10-2-0013c (October 27, 2010); Spokane County v. City of Airway Heights, EWGMHB No. 13-1-0007 (June 6, 2014). But see, Kittitas County v. Eastern Washington Growth Management Hearings Board, *supra*, allowing Kittitas County to disregard recommendations from Washington State Department of Transportation regarding its airport overlay zone, “The statutory scheme requires only that counties “discourage” incompatible uses. RCW 36.70.547. Discouragement is not the same as prohibition.”

<sup>63</sup> RCW 36.70A.200(5).

<sup>64</sup> 97 Wn.App. 920 (1999).

<sup>65</sup> RCW 36.70A.070(3).

<sup>66</sup> RCW 36.70A.070(4).

water and wastewater needs. GMA requires that proof of potable water supply be in hand prior to building new residential housing.<sup>67</sup> Adequate water supplies must be on hand before final plat approvals can be issued.<sup>68</sup>

In addition, before approving a subdivision plat, a county or city must determine whether appropriate provisions were made for public health, water supplies, sanitary wastes, and other basic infrastructure.<sup>69</sup> Construction of mitigating improvements may be required as a condition of approval.<sup>70</sup>

Although GMA directs that the majority of future population growth and jobs be located inside of designated urban growth areas, there remains a large percentage of future population that will locate in rural areas. Even in rural areas, counties must ascertain that water is legally available, and not just physically or factually available, consistent with the land uses allowed in its comprehensive plan and development regulations.<sup>71</sup>

#### *D. Protect resource lands and the natural environment*

GMA includes among its 13 goals an environmental goal: *Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.*<sup>72</sup> Compared to many of the other goals in the Act, there is little substantive direction for how to protect and enhance water (and air) quality. It is the land use element that best addresses water quality. It requires protection of ground water for

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<sup>67</sup> RCW 19.27.097. A county (or city) is explicitly required to verify the existence of an adequate water supply for a building that requires potable water. The building permit applicant must provide evidence of potable water through a water right permit from Ecology, a letter from an approved water purveyor stating that it is able to supply water, or another reliable indicator of water supply. The statute also gives counties the authority to place conditions on the building permit if it will be hooked up to an existing public water system.

In non-GMA counties, the county and state may mutually agree on areas in the county where the potable water requirement shall not apply.

<sup>68</sup> Knight v. City of Yelm, 173 Wn.2d 325, 267 P.3d 973 (2011).

<sup>69</sup> RCW 58.17.110.

<sup>70</sup> RCW 58.17.120

<sup>71</sup> Kittitas County, *supra*.

<sup>72</sup> RCW 36.70A.020(10).

public water supplies; review of drainage, flooding and stormwater run-off; and guidance for corrective actions to mitigate or cleanse discharges that pollute the waters of the state.<sup>73</sup> The rural element also is to include measures to protect surface and ground water resources.<sup>74</sup>

GMA includes specific direction to protect habitat -- and indirectly water quality and instream flows -- through the requirement to designate and protect critical areas.<sup>75</sup> Since 1995, the designation and protection of critical areas “shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.”<sup>76</sup>

The legislative desire to ground planning and policy in science has been another battleground in GMA implementation. While the Supreme Court has not adopted a precise definition for “best available science,” it suggests that counties and cities “produce valid scientific information and consider competing scientific information and other factors through analysis constituting a reasoned process.”<sup>77</sup> If a county or city chooses to depart from the best available science, it must identify in the record a reasoned justification for its decision.<sup>78</sup>

GMA also requires all counties to designate agricultural, forest and mineral resource lands<sup>79</sup> and all GMA-planning counties to adopt development regulations to protect

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<sup>73</sup> RCW 36.70A.070(1).

<sup>74</sup> RCW 36.70A.070(5).

<sup>75</sup> The direction to protect critical areas applies throughout a jurisdiction’s development code. For example, a subdivision ordinance can be noncompliant for failure to protect critical areas from storm water discharge. *Stevens County v. Eastern Washington Growth Management Hearings Bd.*, 162 Wn.App. 1035 (2011).

<sup>76</sup> RCW 36.70A.172.

<sup>77</sup> *Concerned Citizens of Ferry County v. Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005). Prior to Ferry County, Division II held that “evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.” *Honesty in Envtl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn.App. 522, 979 P.2d 864 (1999).

<sup>78</sup> *Yakima County v. Eastern Washington Growth Mgmt. Hearings Bd.*, 168 Wn.App. 680, 279 P.3d 434 (2012).

<sup>79</sup> RCW 36.70A.170.

those designated lands.<sup>80</sup> Designation and protection of resource lands has generated great controversy. After many challenges in many counties, the Supreme Court identified three key criteria for designation of agricultural land of long-term commercial significance:

1. Is the land already characterized by urban growth;
2. Is the land “primarily devoted” to commercial production of agricultural products;
3. Is the land of long-term commercial significance?<sup>81</sup>

The boards and courts also give close scrutiny to de-designation of resource lands.<sup>82</sup> Conversion of agricultural land to recreational uses is contrary to the explicit purpose of RCW 36.70A.177 to conserve agricultural lands and maintain and enhance the agricultural industry.

Protection of critical areas has frequently conflicted with the protection of agricultural lands.<sup>83</sup> But after many years of litigation and legislation, it appears that best management practices and adaptive management programs can resolve this dilemma.<sup>84</sup> Chapter 360, Laws of 2011, authorizes voluntary stewardship programs as an alternative means to protect critical areas in areas where agricultural activities are conducted.<sup>85</sup>

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<sup>80</sup> RCW 36.70A.060.

<sup>81</sup> *Lewis County v. Western Washington Growth Management Hearings Bd.*, 157 Wn.2d 488, 139 P.3d 1096 (2006).

<sup>82</sup> *King County v. Cent. Puget Sound Washington Growth Management Hearings Bd.*, 142 Wn.2d 543, 14 P.3d 133 (2000); *Friends of Pierce County v. Pierce Co.*, CPSGMHB No. 12-3-0002c (July 9, 2012).

<sup>83</sup> *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 166 P.3d 1198 (2007); *Yakima County v. Eastern Washington Growth Mgmt. Hearings Bd.*, 168 Wn.App. 680, 279 P.3d 434 (2012); *Whatcom County v. Western Washington Growth Management Hearings Bd.*, 186 Wn.App. 32, 344 P.3d 1256 (2015), *appeal pending*.

<sup>84</sup> *WEAN v. Island County*, WWGMHB No. 98-2-0023 (August 30, 2006) and WWGMHB No. 06-2-0012 (September 14, 2006); <sup>84</sup> *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 166 P.3d 1198 (2007).

<sup>85</sup> RCW 36.70A.700 - 760.



The nexus of shoreline management and critical areas protection has created confusion in the courts, which required legislative resolution.<sup>86</sup>

*E. Respect regional differences and provide cities and counties a variety of ways to accomplish the four goals above*

In the initial crafting of GMA in 1990 and 1991, the Legislature carefully attempted to limit the role of state government in the development of local plans and regulations. Not only is the state unable to reject a county or city plan,<sup>87</sup> the state's rulemaking authority -- typically provided to an agency to elaborate upon and clarify provisions of a complex statute -- is restricted to adoption of "procedural criteria" and "guidelines" to assist local governments adopting GMA plans and regulations.<sup>88</sup> Local GMA plans and development regulations, effective upon adoption, could be overturned by a Growth Management Hearings Board only if a petitioner demonstrated by a "preponderance of the evidence" that the challenged plan or ordinance did not meet the requirements Act.<sup>89</sup> The Legislature has since attempted to further constrain board discretion to overturn local decisions<sup>90</sup> – a pursuit that the courts have joined.<sup>91</sup>

As indicated in many of the decisions cited above in this paper, courts have generously granted a presumption of validity to city and county decisions, whether sizing an urban

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<sup>86</sup> RCW 36.70A.480.

<sup>87</sup> Comprehensive plans and development regulations "are presumed valid upon adoption." RCW 36.70A.320 (1). Further, local plans are binding on state agency actions – a potentially powerful, but as yet untested provision. RCW 36.70A.103. The exception: the legislature exempted from 36.70A.103 and preempted other local regulatory authority regarding the siting, construction, renovation and operation of "secure community transition facilities" for sexual offenders leaving the state civil commitment facility. See 2002 Wash. Laws Ch. 68, section 9, *codified at* RCW 71.09.342.

<sup>88</sup> RCW 36.70A.190(4)(b).

<sup>89</sup> 1991 Wash. Laws 1<sup>st</sup> Sp. Sess., Ch.32., section 13.

<sup>90</sup> Drafters of the 1997 GMA amendments believe the "clearly erroneous" standard of review to be more deferential to the local legislative authority than the "preponderance of the evidence" standard. See 1997 Wash. Laws Ch. 429, sections 2, 20; *codified at* RCW 36.70A.320 (3) and RCW 36.70A.3201.

<sup>91</sup> *Quadrant Corp. v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005); *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005) (growth boards lack authority to fill GMA policy gaps).

growth area<sup>92</sup>, designating rural lands and uses<sup>93</sup>, or determining appropriate urban or rural densities. Since its decision in Viking Properties,<sup>94</sup> the court has repeatedly affirmed that the Growth Boards have no ability or authority to establish “bright line” rules, emphasizing that board rulings on city and county actions must be based on “local circumstances.”<sup>95</sup> The limitation appears to be a requirement to “show our work” and explain. To the extent counties consider local circumstances in planning the rural element of their comprehensive plans, or deviate from best available science, they must develop some kind of written explanation.<sup>96</sup>

### III. CONCLUSION

Whether one talks to the development community or the environmental community, an honest appraisal of GMA after 25 years would admit to both success and failure. An early assessment by Professor Settle remains true:

The state’s role is limited to support and enforcement, while local governments must endure incessant, acrimonious debate, make extremely difficult political choices, and formulate complex plans and regulations.<sup>97</sup>

GMA is about managing change<sup>98</sup> and change is never easy. Implementation of GMA has been fraught with litigation since its enactment<sup>99</sup> and continues to this day.<sup>100</sup> As is

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<sup>92</sup> Thurston County v. Western Washington Growth Management Hearings Board, 164 Wn.2d 329, 190 P.3d 38 (2008).

<sup>93</sup> Kittitas County v. Eastern Washington Growth Management Hearings Board, 172 Wn.2d 144, 256 P.3d 1193 (2011).

<sup>94</sup> Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 118 P.3d 322 (2005).

<sup>95</sup> Thurston County, *supra*; Gold Star Resorts v. Futurewise, 167 Wn.2d 723, 222 P.3d 791 (2009); Yakima County v. Eastern Washington Growth Mgmt. Hearings Bd., 168 Wn.App. 680, 279 P.3d 434 (2012).

<sup>96</sup> Kittitas County, *supra*; Yakima County, *supra*.

<sup>97</sup> Settle and Gavigan, *supra* note 5, at 896-97.

<sup>98</sup> “Growth management describes how people and their governments deal with change.” TOM DANIELS, When City and County Collide: Managing Growth in the Metropolitan Fringe 3, Island Press (1999).

<sup>99</sup> Settle, Washington’s Growth Management Revolution Goes to Court, 23 SEATTLE U. L. REV. 5, 44-45 (1999).

true across the country where growth management or smart growth is undertaken, the acrimony has been most intense on the city-rural fringe, where there are more critical areas in need of protection and many more land use expectations dashed by zoning.<sup>101</sup>

In Washington, city governments – the beneficiaries of most population growth and new development -- are generally happy with the Act even while some city residents are unhappy with higher densities. County governments – burdened with the unhappy task of preventing development and the difficult reality of a shrinking fiscal pie<sup>102</sup> -- generally are not.

Having seen no serious efforts to repeal the Act since the mid-1990s, I suspect that both the legislative and executive branches of the state would also consider the results mixed and incomplete. GMA is here to stay at least in part because the alternatives of greater local control or more state control are even less appealing. Efforts to tweak the Act in one direction or another will continue.

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<sup>100</sup> Consider *Hirst v. Whatcom County*, argued at the Washington Supreme Court on October 20, 2015. The appeal concerns an alleged conflict between the GMA provisions requiring protection of surface and ground water and existing regulations of the Department of Ecology. *Whatcom County v. Western Washington Growth Management Hearings Bd.*, 186 Wn.App. 32, 344 P.3d 1256 (2015).

<sup>101</sup> TOM DANIELS, *When City and County Collide: Managing Growth in the Metropolitan Fringe*, Island Press (1999). Across the country, where efforts to manage growth take place, conflict is centered at the urban/rural interface.

<sup>102</sup> Local sales tax receipts collected inside a city are shared 85/15 with the larger share going to the city. All local sales tax receipts generated in the unincorporated area belong to the county. Due to GMA's rule requiring that urban-level development locate in urban growth areas, most sales tax generating businesses must now locate in cities. While demand for some services shifts with jurisdictional boundaries, counties remain responsible for many costly countywide services, such as courts, criminal prosecution, incarceration, public health, and elections.