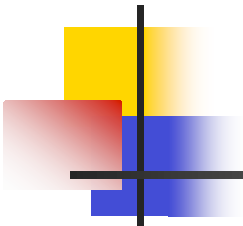




Recent GMA Decisions in the Appellate Courts

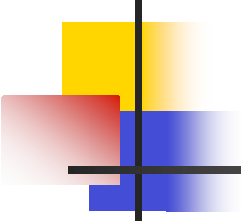
LSI GMA CLE
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Six Themes for 2006:

- Deference/Standard of Review
 - Relationship Between GMA Goals and Requirements
 - Designation and Protection of Critical Areas and Inclusion of Best Available Science
 - Designation and Conservation of Natural Resource Lands
 - Scope of GMA Petitions vs. LUPA Petitions
 - Other Procedural Issues
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Deference/Standard of Review

- Board reviews record before local gov't.

RCW 36.70A.290(4)

- Petitioner has burden of showing noncompliance.

RCW 36.70A.300(2)

- Order based exclusively on compliance with GMA, SMA, SEPA.

RCW 36.70A.300(1)

- Clearly erroneous std.

RCW 36.70A.320(3)

- Deference to local gov'ts in how they plan for growth, consistent with GMA goals and req'ts.

RCW 36.70A.3201

- Court reviews record before Board.

RCW 34.05.558, .566

- Appellant has burden of showing Board decision is invalid. RCW 34.05.570(1)(a)

- Review based on showing of prejudice and on nine criteria, including:
 - Unconstitutional
 - Unauthorized
 - Unlawful procedure
 - Error of law
 - Not substantial evidence
 - Issues not decided
 - Arbitrary or capricious

RCW 34.05.570(1)(d), (3)

Deference/Standard of Review

- *Redmond v. CPSGMHB*, 136 Wn.2d 38 (1998).

Courts review issues of law de novo, according “substantial weight” to the Board’s construction of statutory words and phrases and legislative intent, but ultimately it is for the court to determine the purpose and meaning of statutes, even when the court’s interpretation is contrary to that of the Board.

Deference/Standard of Review

- *Redmond v. CPSGMHB*, 136 Wn.2d 38 (1998).
- *King Cy. v. CPSGMHB*, 142 Wn.2d 543 (2000).

Courts give "substantial weight" to the Board's interpretation of the GMA [reaffirming *Redmond*].

The Board must give deference to counties and cities in how they plan for growth, *consistent with the GMA's goals and requirements* [Court's emphasis]. While local governments have broad discretion in developing comprehensive plans and development regulations tailored to local circumstances, that discretion is bounded by the GMA's goals and requirements.

Deference/Standard of Review

- *Redmond v. CPSGMHB*, 136 Wn.2d 38 (1998).
- *King Cy. v. CPSGMHB*, 142 Wn.2d 543 (2000).
- *Thurston Cy. v. Cooper Pt. Ass'n*, 148 Wn.2d 1 (2002).

Courts give "substantial weight" to the Board's interpretation of the GMA [again reaffirming *Redmond*].

Courts and the Board owe deference to local policy choices made under the GMA only if those choices are consistent with the goals and requirements of the GMA [reaffirming *King Cy.*].

Deference/Standard of Review

- *Redmond v. CPSGMHB*, 136 Wn.2d 38 (1998).
- *King Cy. v. CPSGMHB*, 142 Wn.2d 543 (2000).
- *Thurston Cy. v. Cooper Pt. Ass'n*, 148 Wn.2d 1 (2002).
- *Quadrant Corp. v. GMHB*, 154 Wn.2d 224 (2005).

Citing a “clear legislative directive” evident in the GMA, the Court held that deference to local planning that is consistent with the GMA’s goals and requirements “supersedes” APA deference to the Boards.

Deference to a county or city ends when a petitioner shows that the local action is a clearly erroneous application of the GMA [reaffirming *King Cy.* and *Cooper Pt.*].

Therefore, a Board’s order that fails to apply the “clearly erroneous” standard of review is not entitled to judicial deference.

Deference/Standard of Review



- *Redmond v. CPSGMHB*, 136 Wn.2d 38 (1998).
- *King Cy. v. CPSGMHB*, 142 Wn.2d 543 (2000).
- *Thurston Cy. v. Cooper Pt. Ass'n*, 148 Wn.2d 1 (2002).
- *Quadrant Corp. v. GMHB*, 154 Wn.2d 224 (2005).
- *Lewis Cy. v. WWGMHB*, 157 Wn.2d 488 (2006).

While the Boards must defer to local choices that are consistent with the GMA, the Boards are entitled to deference in determining what the GMA requires, and courts give "substantial weight" to the Board's interpretation of the GMA [reaffirming *Redmond*, *King Cy.* and *Cooper Pt.*].

GMA Goals & Requirements

- GMA goals are used exclusively to guide the development of CPs and DRs. RCW 36.70A.020
- A board may determine that a comprehensive plan provision or development regulation is invalid if its order includes a determination, supported by findings of fact and conclusions of law, that the plan or regulation would substantially interfere with the fulfillment of the GMA's goals. RCW 36.70A.302(1)
- A board must find compliance unless it determines that the challenged action is "clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter." RCW 36.70A.320(3)
- Boards are to grant deference to counties and cities in how they plan for growth, consistent with the GMA's goals and requirements. RCW 36.70A.3201

GMA Goals & Requirements

- *Diehl v. Mason Cy.*, 94 Wn. App. 645 (1999).
The GMA allows the Board to consider both the goals and specific requirements of the GMA when considering a petition alleging noncompliance.

GMA Goals & Requirements

- *Diehl v. Mason Cy.*, 94 Wn. App. 645 (1999).
- *Low Income Housing Institute v. City of Lakewood*, 119 Wn. App. 110 (2003).

A Growth Management Hearings Board must consider both the GMA's goals and its requirements when determining whether a comprehensive plan complies with the GMA.

The Board erred by failing to address whether the challenged provision complied with the GMA's affordable housing goal.

GMA Goals & Requirements

- *Diehl v. Mason Cy.*, 94 Wn. App. 645 (1999).
- *Low Income Housing Institute v. City of Lakewood*, 119 Wn. App. 110 (2003).
- *Quadrant Corp. v. GMHB*, 154 Wn.2d 224 (2005).

GMA goals are not considered for their substantive effect in isolation from the corresponding requirements in the GMA.

GMA goals are to be used exclusively to guide the development of comprehensive plans and development regulations.

GMA Goals & Requirements

- *Diehl v. Mason Cy.*, 94 Wn. App. 645 (1999).
- *Low Income Housing Institute v. City of Lakewood*, 119 Wn. App. 110 (2003).
- *Quadrant Corp. v. GMHB*, 154 Wn.2d 224 (2005).
- *Lewis Cy. v. WWGMHB*, 157 Wn.2d 488 (2006).

The GMA provides general planning goals to guide the development and adoption of comprehensive plans and development regulations, and it imposes specific requirements on counties and cities with which they must comply.

The GMA's goals do not independently create substantive requirements on counties and cities.

Critical Areas & BAS

- All counties/cities must designate critical areas.
RCW 36.70A.170(1)(d)
- All counties/cities must adopt DRs to protect critical areas.
RCW 36.70A.060(2)
- All counties/cities must include BAS in developing policies and DRs to protect the functions and values of critical areas.
RCW 36.70A.172(1)
- All counties/cities must give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.
RCW 36.70A.172(1)

Critical Areas & BAS

- *HEAL v. CPSGMHB, 96 Wn. App. 522 (1999).*

Local governments must give substantive consideration to BAS when developing critical area policies and regulations.

A county or city "cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make."

The BAS requirement is intended to ensure that critical areas regulations are based on reliable evidence, not on "speculation and surmise."

Compliance with the BAS requirement may be necessary to satisfy constitutional nexus and proportionality requirements.

Critical Areas & BAS

- *HEAL v. CPSGMHB*, 96 Wn. App. 522 (1999).
- *WEAN v. WWGMHB*, 122 Wn. App. 156 (2004).

Evidence of BAS must be included in the record and considered substantively in the development of critical areas regulations (reaffirming *HEAL*).

A critical areas regulation that is outside the range of BAS must be supported by findings explaining the reasons for departing from BAS and identifying the other GMA goals being implemented by that departure.

An exemption from critical areas regulations must be supported by evidence in the record that the exemption is necessary and was crafted using BAS.

The Board is not required to defer to the local government's determination as to which science in the record is the best available.

Critical Areas & BAS

- *HEAL v. CPSGMHB*, 96 Wn. App. 522 (1999).
- *WEAN v. WWGMHB*, 122 Wn. App. 156 (2004).
- *Clallam Cy. v. WWGMHB*, 130 Wn. App. 127 (2005).

The GMA authorizes some regulation of existing uses in critical areas and their buffers to advance the GMA's goals.

Any exemption from critical areas regulation must be balanced with restrictions based on BAS that address any threatened harm resulting from the exemption (agreeing with *WEAN*).

Critical Areas & BAS

- *HEAL v. CPSGMHB*, 96 Wn. App. 522 (1999).
- *WEAN v. WWGMHB*, 122 Wn. App. 156 (2004).
- *Clallam Cy. v. WWGMHB*, 130 Wn. App. 127 (2005).
- *Ferry Cy. v. Concerned Friends of Ferry Cy.*, 155 Wn.2d 824 (2005).

A critical areas regulation must be supported by scientific information in the record.

The steps taken in analyzing the scientific information must constitute a reasoned process, with the process evident in the record.

Critical Areas & BAS

- *HEAL v. CPSGMHB*, 96 Wn. App. 522 (1999).
- *WEAN v. WWGMHB*, 122 Wn. App. 156 (2004).
- *Clallam Cy. v. WWGMHB*, 130 Wn. App. 127 (2005).
- *Ferry Cy. v. Concerned Friends of Ferry Cy.*, 155 Wn.2d 824 (2005).
- *Swinomish Tribe v. WWGMHB*, WaSCt No. 76339-9 (argued Feb. 7, 2006).

Natural Resource Lands

- All counties/cities must designate NRLs - those that are not characterized by urban growth and are of long-term commercial significance.

RCW 36.70A.170(1)(a)-(c)

- Fully planning counties/cities must adopt DRs to conserve NRLs.

RCW 36.70A.060(1)

- DRs must ensure adjacent land uses do not interfere with continued NRL use, in accustomed manner using BMPs.

RCW 36.70A.060(1)

- No forest/agricultural land in UGA without TDR program.

RCW 36.70A.060(4)

- Counties/cities may use innovative zoning techniques for agricultural land.

RCW 36.70A.177

Natural Resource Lands

- *Redmond v. CPSGMHB, 136 Wn.2d 38 (1998).*
Lands "primarily devoted to" agriculture are those that are used or capable of being used for agricultural production.

Natural Resource Lands

- *Redmond v. CPSGMHB*, 136 Wn.2d 38 (1998).
- *King Cy. v. CPSGMHB*, 142 Wn.2d 543 (2000).

The GMA's agricultural lands provisions impose a mandatory duty to designate and conserve agricultural lands of long-term commercial significance.

The use of "innovative zoning techniques" to conserve agricultural lands must satisfy the GMA's mandate to maintain and enhance the agricultural industry.

Natural Resource Lands

- *Redmond v. CPSGMHB*, 136 Wn.2d 38 (1998).
- *King Cy. v. CPSGMHB*, 142 Wn.2d 543 (2000).
- *Redmond v. CPSGMHB*, 116 Wn. App. 48 (2003).

Apparently, the same criteria govern the de-designation of agricultural land as govern its designation.

Natural Resource Lands

- *Redmond v. CPSGMHB*, 136 Wn.2d 38 (1998).
- *King Cy. v. CPSGMHB*, 142 Wn.2d 543 (2000).
- *Redmond v. CPSGMHB*, 116 Wn. App. 48 (2003).
- *Lewis Cy. v. WWGMHB*, 157 Wn.2d 488 (2006).

Agricultural land is: (1) is not already characterized by urban growth; (2) is primarily devoted to commercial agricultural production, or capable of such production; and (3) has long-term commercial significance.

Under RCW 36.70A.177, a county may allow non-farm uses on designated agricultural land, if the uses are designed to conserve agricultural land and encourage the agricultural economy.

Natural Resource Lands

- *Redmond v. CPSGMHB*, 136 Wn.2d 38 (1998).
- *King Cy. v. CPSGMHB*, 142 Wn.2d 543 (2000).
- *Redmond v. CPSGMHB*, 116 Wn. App. 48 (2003).
- *Lewis Cy. v. WWGMHB*, 157 Wn.2d 488 (2006).
- *Arlington v. CPSGMHB*, COA I No. 04-2-09180-1 (argued Sept. 14, 2006).

GMA vs. LUPA

- GMHB may hear only PFRs alleging :
 - Noncompliance with GMA
 - Noncompliance with SMA, related to SMP adoption or amendment
 - Noncompliance with SEPA, related to CPs, DRs, or SMPs
 - OFM population projections should be adjusted.

RCW 36.70A.280(1)

- LUPA petition available only for review of a "land use decision."

RCW 36.70C.020(1), .030(1)

- LUPA petition not available for review of:
 - Land use decisions subject to review by a quasi-judicial body created by state law: GMHB, SHB, etc.
 - Other exceptions.

RCW 36.70C.030(1)

GMA vs. LUPA

- *Wenatchee Sportsmen v. Chelan Cy.*, 141 Wn.2d 169 (2000).

A site-specific rezone must be challenged in a LUPA petition, not in a petition to a Growth Management Hearings Board.

GMA vs. LUPA

- *Wenatchee Sportsmen v. Chelan Cy.*, 141 Wn.2d 169 (2000).
- *Moore v. Whitman Cy.*, 143 Wn.2d 96 (2001).

The Growth Management Hearings Boards lack jurisdiction to hear a challenge to critical areas ordinances in the ten counties not planning under RCW 36.70A.040. Maybe a LUPA petition could be used to challenge them.

GMA vs. LUPA

- *Wenatchee Sportsmen v. Chelan Cy.*, 141 Wn.2d 169 (2000).
- *Moore v. Whitman Cy.*, 143 Wn.2d 96 (2001).
- *Somers v. Snohomish Cy.*, 105 Wn. App. 937 (2001).

A LUPA petition that even suggests noncompliance with the GMA may be dismissed by the superior court for lack of subject matter jurisdiction.

GMA vs. LUPA

- *Wenatchee Sportsmen v. Chelan Cy.*, 141 Wn.2d 169 (2000).
- *Moore v. Whitman Cy.*, 143 Wn.2d 96 (2001).
- *Somers v. Snohomish Cy.*, 105 Wn. App. 937 (2001).
- *Woods v. Kittitas Cy.*, 130 Wn. App. 573 (2005), review granted, 143 P.3d 829 (2006).

A LUPA petition that alleges noncompliance with the GMA must be dismissed by the superior court for lack of subject matter jurisdiction.

Other: Notice

Counties/cities must implement notice procedures that are reasonably calculated to provide notice of proposed GMA actions to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations.

RCW 36.70A.035(1)

Examples:

- Posting, for site-specific proposals;
- Publishing notice in a newspaper;
- Notifying interested public or private groups;
- Placing notices in appropriate regional, neighborhood, ethnic, or trade journals;
- Publishing notice in agency newsletters or sending notice to agency mailing lists

RCW 36.70A.035(1)

Other: Notice

- *Holbrook v. Clark Cy.*, 112 Wn. App. 354 (2002).

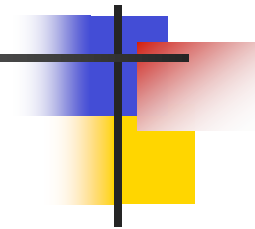
The GMA does not require counties and cities to provide individual notice to landowners of legislative actions taken under the GMA.

Neither does due process.

Other: Notice

- *Holbrook v. Clark Cy.*, 112 Wn. App. 354 (2002).
- *Chevron USA v. CPSGMHB*, 156 Wn.2d 131 (2005).

Due process does not require counties and cities to provide individual notice to landowners of legislative actions taken under the GMA.



End

