Policy Priorities for the Growth Management Act:
Protecting Property Rights

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INTRODUCTION

The Growth Management Act requires that each city and county planning under the Act periodically review and, if necessary, update its comprehensive plan and development regulations. RCW 36.70A.130. As part of this update process, the GMA requires that local government designate and protect critical areas. RCW 36.70A.060(2); RCW 36.70A.172(1). However, the GMA does not require a particular methodology for protecting critical areas. *Whidbey Environmental Action Network v. Island County (WEAN)*, 122 Wn. App. 156, 167 (2004). At the GMA's very foundation is the mandate providing local jurisdictions broad deference in planning decisions: the "GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs." *Viking Properties*, 155 Wn.2d at 125-26; *see also* RCW 36.70A.3201 ("Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances."); WAC 365-195-010(3) (The GMA "process

should be a ‘bottom up’ effort . . . with the central locus of decision-making at the local level.”).

In meeting this mandate, however, the GMA imposes competing, sometimes mutually exclusive, obligations. For example, the GMA requires that local government protect “critical areas” while at the same time “[m]aintain[ing] and enhanc[ing] natural resource-based industries, including productive timber, agricultural, and fishing industries” as well as “[e]ncourag[ing] the conservation of agricultural lands, and discourag[ing] incompatible uses.” *See* RCW 36.70A.060(2), (8). The GMA explicitly eschews establishing priorities amongst these goals: “The [GMA’s planning] goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations.” RCW 36.70A.020. *Swinomish Indian Tribal County. v. Western Washington Growth Mgmt. Hearings Bd.*, No. 76339-9, 2007 WL 2683150 at *2 (2007); *Viking Properties*, 155 Wn.2d at 127-28 (“We decline Viking’s invitation to create an inflexible hierarchy of the GMA goals where such a hierarchy was explicitly rejected by the legislature.”); Richard L. Settle, *Washington’s Growth Management Revolution Goes to Court*, 23 Seattle U. L. Rev. 5, 34 (1999) (The “GMA was spawned by controversy, not consensus. The relative spheres of state mandate and local autonomy were the product of extremely difficult legislative compromise. It is no accident that the GMA contains no provision for liberal construction.”).

To review for compliance with this mandate, the GMA established an administrative review process before the Growth Management Hearings Board. RCW 36.70A.250 *et seq*. The review procedures, however, create a structural impediment to

protecting property rights. On the one hand, the GMA requires local government to balance property rights as one of the planning goals in adopting development regulations. But on the other hand, the GMA prohibits citizens from reviewing the information considered in balancing the property rights goal and bars citizens from challenging a development regulation for failing to substantively comply with the property rights goal before the Growth Boards. Therefore, as a matter of statutory procedure, the issue of property rights is sidelined from all levels of GMA review unless and until a challenge is brought before a court.

GMA Planning Goal 6: Protection of Property Rights

The property rights planning goal has two distinct components:

> Property Rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

RCW 36.70A.020(6) (Planning goals). The first component is the constitutional prohibition against taking private property without due process and just compensation. *See* Attorney General Opinion No. 23 (1992); *see also* RCW 36.70A.370; WAC 365-195-855.[1] The second component is the protection of property rights against arbitrary and discriminatory actions even where there is no constitutional taking. *See Id.*

GMA Procedure for Protecting Property Rights

To assure that property rights are appropriately considered in developing GMA regulations, the Act directed the Office of the Attorney General to develop a process which local government is required to utilize in order to evaluate its proposed regulations

[1] Noting, however, that the Growth Board's authority is limited to whether local government complied with GMA's procedures in adopting development regulations–not whether the local government action was lawful or even correct.

"to assure that such actions do not result in an unconstitutional taking of private property."

> (1) The state attorney general shall establish by October 1, 1991, an orderly process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. It is not the purpose of this section to expand or reduce the scope of private property protections provided in the state and federal Constitutions. The attorney general shall review and update the process on an annual basis to maintain consistency with changes in case law.
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> (2) Local governments that are required or choose to plan under RCW 36.70A.040 and state agencies shall utilize the process established by subsection (1) of this section to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property.

RCW 36.70A.370(1), (2).

Review of Actions Taken to Protect Property Rights

But this requirement that local government follow a procedure to evaluate a proposed regulation's effect on property rights is a toothless tiger. In this regard, the Act takes away exactly what it requires. The GMA shields the local government's process for protecting private property from citizen oversight and judicial review:

> The process used by government agencies shall be protected by attorney client privilege. Nothing in this section grants a private party the right to seek judicial relief requiring compliance with the provisions of this section.

RCW 36.70A.370(4). Indeed, the State Attorney General's office opined that nothing in the GMA prohibits local government from adopting regulations that result in a taking of private property–so long as the regulation's effect on property rights was considered in the process: *See* Attorney General Opinion No. 23 ("Of course, if the government takes private property, it will be liable for just compensation.").

Ironically, it is the constitutional nature of this GMA goal that assures that local government's protection of property rights will evade review before the Growth Boards. The Growth Boards lack the authority to review a substantive challenge alleging a failure to protect property rights. *See*, *e.g.*, *Keesling v. King County*, CPSGMHB, No. 05-3-001 at 23 (Final Decision and Order, 2005) (ruling that property rights challenges, whether brought under statute or the constitution cannot be brought in GMA challenge); *Whidbey Environmental Action Network v. Island County*, WWGMHB, No. 06-2-0023 (Final Decision and Order, 2007) (Growth Boards do not have the authority to determine what property rights exist under Washington law); *Shulman v. City of Bellevue*, CPSGMHB, No. 95-3-0076 (Final Decision and Order, 1996) (Growth Board does not have the authority to determine whether there has been a violation of RCW 36.70A.370). Instead, much like the Act's "best available science" provisions, the Growth Boards review property rights challenges for their procedural compliance with the GMA.[2] In addressing such challenges, Growth Boards look to see if the local government "considered" property rights in developing the GMA regulations. *See*, *e.g.*, *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Board*, 113 Wn. App. 615, 628 (2002) (Legislative findings stating that the County "considered" the goals and policies of the GMA satisfied procedural requirement); *Cave et al. v. City of Renton*, CPSGMHB, No. 07-3-0012 (Final Decision and Order, 2007) (rejecting property rights challenge under presumption of validity where only evidence is a statement by the City that it's ordinance recognized property rights); *Shulman*, CPSGMHB, No. 95-3-0076

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[2]However, unlike the BAS requirement which mandates that the public be allowed access to BAS documents, citizens are prohibited from reviewing the record upon which local government considered property rights in developing GMA regulations.

("consideration" of property rights goal is merely an issue of procedural compliance–the goal has no substantive requirement).

The GMA's structural impediments to reviewing for compliance with the protection of property rights procedures does not mean that property rights simply disappear once local government proclaims that it considered this goal. Property rights may be raised when a challenge is brought before the superior court or the courts of appeals. Local government is required to comply with Washington's constitution and general laws.[3] *See Honesty in Environmental Analysis and Legislation* (*HEAL) v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 532-33 (1999) (GMA regulations must comply with the constitutional "nexus" and "rough proportionality" limits); *Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property* (AGO 2003)).[4] The "nexus" requirement ensures that land use restrictions necessarily mitigate an activity's direct impacts. *See Nollan v. Cal. Coastal*

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[3]The GMA is not an enacting statute and confers no authority on local government to take private property: "It is not the purpose of [the GMA] to expand or reduce the scope of private property protections." RCW 36.70A.370(1). .

[4]In its *Advisory Memorandum*, the Attorney General's office advised all local governments that development regulations affecting private property adopted pursuant to the GMA must meet nexus and proportionality requirements:

> Sometimes a permit condition will attempt to extract a fee or some interest in property as mitigation for the adverse public impact of the proposed development. Courts have referred to these types of conditions as *exactions*. While such exactions are permissible, government must identify a real adverse impact of the proposed development and be prepared to demonstrate that the proposed exaction is reasonably related to that impact. The government must also be prepared to demonstrate that the burden on the property owner is roughly proportional to the impact being mitigated.

citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Comm'n, 483 U.S. 825, 837 (1987). Similarly, the necessary mitigation must arise from an individualized determination and must be "roughly proportional" in both nature and extent to the activity's direct impact. *See Dolan v. City of Tigard*, 512 U.S. 374, 390-92 (1994). The *HEAL* Court explained:

> [T]he policies and regulations adopted under GMA must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications. . . . Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal. The rough proportionality requirement limits the extent of the mitigation measures, including denial, to those which are roughly proportional to the impact they are designed to mitigate. *Both requirements have also been incorporated into the GMA amendments to RCW 82.02 authorizing development conditions*.

HEAL, 96 Wn. App at 533-34 (emphasis added). The *HEAL* Court further considered the necessary interaction between the important statutory and constitutional nexus and rough proportionality protections and the GMA's requirement to use best available science when designating and protecting critical areas:

> For example, if the City proposed a policy prohibiting development on slopes steeper than a 40 percent grade or requiring expensive engineering conditions for any permitted project, only the best available science could provide its policy-makers with facts supporting those policies and regulations which, when applied to an application, will assure that the nexus and rough proportionality tests are met. If the City failed to use the best available science here in making its policy decision and adopting regulations, the permit decisions it bases on those regulations may not pass constitutional muster under *Nollan* and *Dolan*.

HEAL, 96 Wn. App. at 534. The nexus and rough proportionality standards present important statutory and constitutional limitations on local government discretion in adopting GMA policies and regulations. *HEAL*, 96 Wn. App. at 533.

CONCLUSION

So, what does it mean for the property rights goal to escape initial public scrutiny and administrative review when the issue may be raised later before a Constitutional court? As a practical matter, protection of property rights is the only identified goal or requirement of the GMA that does not fall within the Act's public disclosure and participation requirements. RCW 36.70A.035; WAC 365-195-600. Add to that the fact that the GMA prohibits review for substantive compliance with the protection of property rights procedures. RCW 36.70A.370(4). By the time a citizen can bring a property rights challenge to a GMA regulation, local government's balancing of the other GMA planning goals and requirements have already been subjected to public review, input and comment, political discretion, and quasi-judicial review by the Growth Board. While the GMA expressly eschews prioritization amongst the several planning goals, it has structurally taken protection of property rights off the table during the critical development and review process. Isolating the property rights issues after all of the other competing have been balanced and reviewed is much like un-baking a cake to re-measure the ingredients– a task that most courts, let alone bakers, are loathe to perform.