

MEMORANDUM

SNOHOMISH COUNTY, WASHINGTON DRAFT ORDINANCE ON PHASING OF DEVELOPMENT IN URBAN GROWTH AREAS

September 22, 2000

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SUMMARY OF REQUEST

The National Association of Realtors[®] (“NAR”) has requested that we review and comment on the proposed ordinance that would amend the Snohomish County Code to require phasing of development in urban growth areas (“UGAs”). In particular, NAR and the Snohomish County – Camano Association of Realtors[®] (“SCCAR”) have expressed concerns about the workability of the new ordinance and the likely ramifications for builders and developers. We have based our analysis in part on materials received through NAR, including a draft copy of the ordinance (“Ordinance”) and a copy of briefing materials presented by the Snohomish County Planning Commission on January 25, 2000 (“Briefing Materials”).

EXECUTIVE SUMMARY

Under the Ordinance, development applications will not be accepted by the county for any areas covered by a development phasing overlay (“DPO”). As a result, the county proposes to implement a rigid and mechanical approach that halts all development in areas where at least one category of capital facilities is identified as being insufficient to support further development. By eliminating the opportunity to even submit an application, the Ordinance deprives developers of the chance to work with county staff to try to meet county requirements. This approach removes the flexibility necessary for reasonable adjustments in the planning implementation process, as it allows no opportunity to consider the particulars of individual project proposals.

The Ordinance’s vague definition of “capital facilities” is also problematic. Although the Ordinance specifically covers parks and recreation, surface water, and transportation facilities, it expressly declines to limit the types of capital facilities that could trigger DPOs to those categories. This vagueness might make the Ordinance vulnerable to attack on due process grounds. In addition, if the Ordinance is applied to require developers to disproportionately contribute to capital facilities in order to secure project approval or is imposed for a longer period than necessary, then the Ordinance may also be open to a “takings” challenge.

We caution that we are not Washington attorneys and our analysis is not legal advice as to the interpretation and effect of Washington law. Rather, our comments reflect our experience with land use laws and regulations generally. We encourage you to consult with local counsel to the extent that you require a legal opinion on any of the issues discussed in this memorandum.

BACKGROUND ANALYSIS

Phased Growth in UGAs Tied to Concurrency Appears Generally Consistent With Growth Management Act

The Washington Growth Management Act (“GMA”), requires counties to “designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if is not urban in nature.”¹ Within those UGAs:

¹ Rev. Code Wash. § 36.70A.110(1).

Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capabilities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas.²

In addition, the GMA is based on “[t]he principle that development and the providing of public facilities and services needed to support development should occur concurrently.”³ The term “concurrency” is defined as “the situation in which adequate facilities are available when the impacts of development occur, or within a specified time thereafter.”⁴ According to GMA regulations, “[t]he achievement of concurrency should be sought with respect to public facilities in addition to transportation facilities [and] [t]he list of such additional facilities should be locally defined.”⁵ When identifying public facilities to which concurrency requirements will apply, a local government “should designate appropriate levels of service.”⁶ According to GMA regulations, these levels of service must be realistically set, as “[s]etting such levels too high could . . . result in no growth [which,] [a]s a deliberate policy, . . . would be contrary to the act.”⁷

Local governments not only have broad authority under the GMA to designate public facilities that will be subject to concurrency requirements, they also have considerable flexibility when designing regulations to implement those concurrency requirements.⁸ According to GMA regulations, “[t]he variations possible in designing a concurrency management system are many.”⁹ Among the options suggested in the GMA for responding to insufficiently available public facility or service capacity are: (1) “[d]enial of the development, subject to resubmission when adequate public facilities are made available;” and (2) “[d]evelopment of a system of deferrals, approving proposed developments in advance but deferring authority to construct until adequate public facilities become available at the location in question.”¹⁰

Under the GMA, the county is required to identify funding sources for all capital facilities needs identified in the capital facilities element (“CFE”) of the county’s comprehensive plan (“Plan”).¹¹ The county must identify capital improvements funding in at least six-year cycles. Although the county has discretion as to which facilities identified in the CFE will be funded in each cycle, according to the Central Puget Sound Growth Management Hearings Board, all

² Rev. Code Wash. § 36.70A.110(3).

³ Wash. Admin. Code § 365-195-010(6).

⁴ Wash. Admin. Code § 365-195-070(3).

⁵ Wash. Admin. Code § 365-195-070(3). Concurrency with respect to transportation facilities is mandatory under the GMA. Wash. Admin. Code § 365-195-510(1).

⁶ Wash. Admin. Code § 365-195-510(3).

⁷ Wash. Admin. Code § 365-195-510(3)(b).

⁸ See Wash. Admin. Code § 365-195-835(3).

⁹ Wash. Admin. Code § 365-195-835(3).

¹⁰ Wash. Admin. Code § 365-195-835(3)(d)(iii).

¹¹ See *McVitte v. Snohomish County*, CPSGMHB Case No. 00-3-0006c Final Decision and Order (Sept. 11, 2000), at 14-15; see also Rev. Code Wash. § 36.70A.110(2) (UGAs must be defined to accommodate urban growth projected for the succeeding twenty-year period).

capital facilities identified as “needed” in the CFE must ultimately be funded and implemented “at some point during the original 20-year life of the Plan.”¹²

According to the Ordinance, the Snohomish County Comprehensive Plan – General Policy Plan (“GPP”) “directs that land development in UGAs should be phased to guide growth first into areas where existing infrastructure capacity is available.”¹³ This policy appears to be consistent with the GMA. The GMA also authorizes the county to designate public services and facilities that will be subject to concurrency requirements and to develop regulations implementing those concurrency requirements.¹⁴ *In general*, therefore, county implementation of development phasing in UGAs, tied to the provision of public facilities and services, appears to be consistent with the GMA. However, the county’s choice of *method* to implement that phasing can be criticized on both policy and legal grounds.

Snohomish County’s Proposed Development Phasing Overlays

The Ordinance proposes to establish “development phasing overlays” (“DPOs”) within UGAs.¹⁵ DPOs are defined as areas within UGAs “for which revenues from public and/or private sources are needed to provide adequate capital facilities.”¹⁶ The DPOs “may be designated . . . whenever and wherever there is no guarantee that the facilities identified in the [Capital Improvement Program (“CIP”)] as being necessary to support planned development will be provided within six years by either public or private entities.”¹⁷ The county’s CIP will “identify a list of capital facilities needed” in each overlay area.¹⁸ The term “capital facilities” is defined to include land, structures, and improvements “that are needed for, but are not limited to, surface water, parks and recreation, and transportation.”¹⁹

Once a DPO has been identified, development applications, other than for single-family or duplex homes on existing lots, will not be accepted for that area until the county removes the DPO.²⁰ A DPO may be removed when the county determines that “all capital facilities identified in the capital facilities plan for the development of the phasing overlay (i) are included and funded in capital improvement programs adopted by either the county or special purpose districts; or (ii) are assured of construction within six years through the formation of local improvement districts, developer financing, or other sources of private funds.”²¹ DPOs may also be removed from just a portion of an overlay area, based on a finding that adequate facilities exist in that portion to support proposed development.²²

¹² *McVitte v. Snohomish County*, at 15.

¹³ Ordinance at p. 1; *see also* GPP Land Use Objective 2.C.

¹⁴ Wash. Admin. Code § 365-195-835(1).

¹⁵ Ordinance § 32.xx.040. Development phasing overlays will be designated on UGA plan maps and on county zoning maps. Ordinance § 32.xx.050(2).

¹⁶ Ordinance § 32.xx.030(6).

¹⁷ Ordinance § 32.xx.050(1).

¹⁸ Ordinance § 32.xx.050(3).

¹⁹ Ordinance § 32.xx.030(1).

²⁰ Ordinance § 32.xx.060.

²¹ Ordinance § 32.xx.070(1)(a).

²² Ordinance § 32.xx.070(2).

According to the briefing materials prepared by the Planning Commission, in order to define a DPO, a Capital Facilities Chapter for the affected UGA Plan will be developed, to include a six-year financial plan, with identification of inventories, future needs, and funding sources.²³ Based on this capital facilities analysis, “a DPO map would be created which would identify areas that lack necessary infrastructure.”²⁴ Under the GMA, the county is required to prepare a six-year funding plan for capital facilities that are identified in the Capital Facilities Element (“CFE”) of the County Comprehensive Plan (“Plan”).²⁵ Although facilities or improvements identified in the CFE must include those needed to maintain established levels of service in the wake of anticipated growth during the 20-year life of the Plan, the county has discretion to decide when, during that 20-year period, individual projects will be funded.²⁶ Snohomish County, therefore, has significant discretion in designating facilities to be funded under its six-year financial plan. Under the Ordinance, UGAs, or portions thereof, identified as needing capital facilities or improvements to accommodate new growth, where those capital facilities are not fully designated for funding under the six-year plan, would be subject to a DPO.

A landowner or builder wishing to develop in an area subject to a DPO would need to take steps to have the DPO removed, at least with respect to that portion of the DPO in which the development will take place. According to the Briefing Materials, the first step would be for the developer or landowner(s) in the DPO to establish some sort of capital projects funding mechanism, such as a privately created “special funding district.”²⁷ After a funding mechanism is in place, the county executive must make a “finding of adequacy,” determining that adequate facilities will be constructed within six years. Based on the finding of adequacy, “the county council removes the development phasing overlay by ordinance”²⁸

COMMENTS

DPO Approach Eliminates Needed Flexibility In Development Approval Process

As proposed, the Ordinance will rigidly impose a DPO on a UGA, or portion of a UGA, where *any one* of the capital facilities defined for concurrency by the county is deemed to have insufficient capacity to accommodate new development. The Ordinance provides that DPO determinations will be based on the availability of parks and recreational facilities, surface water facilities, and transportation facilities, at a minimum. As discussed above, the term “capital facilities” is not clearly defined in the Ordinance and the county could require that a variety of other public facilities or services be considered as well.

As described in the flow chart prepared by the Planning Commission, a DPO will cover any area where there is an identified deficiency for at least one type of facility. (*See Flow Chart on following page*). As a result, equal weight is given to the provision of parks, for example, as to

²³ Briefing Materials, ¶ 3.

²⁴ *Id.*

²⁵ Rev. Code Wash. § 36.70A.070(3)(d).

²⁶ See *McVitte v. Snohomish County*, CPSGMHB Case No. 00-3-0006c Final Decision and Order (Sept. 11, 2000), at 14-15; see also Rev. Code Wash. § 36.70A.110(2) (UGAs must be defined to accommodate urban growth projected for the succeeding twenty-year period).

²⁷ Briefing Materials (flow chart).

²⁸ Ordinance § 32.xx.070(1)(b) (county council may also remove DPOs through the comprehensive plan amendment process).

transportation needs. This mechanical approach may preclude development in areas that are described in the CIP as needing additional park facilities, for example, even though transportation and surface water facilities may be entirely adequate to support new development. Because development applications for projects in DPO areas will not be accepted for review by county planning staff, there is no opportunity for the county staff to fully consider what may be unique or special circumstances on any given project. The Ordinance would tie the hands of county staff, removing any discretion whatsoever for even *considering* proposals in DPO areas. Developers and landowners should be given the opportunity to at least submit proposals and applications to the county, in an attempt to work with staff to meet requirements for the provision of adequate public facilities tailored to a project proposal.

“Capital Facilities” Should Be More Clearly Defined

Ordinance Cannot Be Thoroughly Evaluated. The Ordinance proposes to require phasing of development in urban growth areas (“UGAs”) based on the availability of “capital facilities.” This phasing will be accomplished by imposing a development phasing overlay (“DPO”) on UGAs, when it is determined that insufficient capital facilities are in place, or expected to be in place within six years, to support further development. The Ordinance defines “capital facilities” to include land, structures, and improvements “that are needed for, *but are not limited to*, surface water, parks and recreation, and transportation.”²⁹ The Ordinance also states that the county and district Capital Improvements Plans (“CIPs”) will identify which capital facilities are needed in each DPO.

It is entirely unclear from the language of the Ordinance what types of facilities will ultimately be subject to the concurrency requirement. Although the Ordinance specifies that facilities needed for “surface water, parks and recreation, and transportation” will be subject to the concurrency requirement, that list could be expanded under the Ordinance. The Ordinance gives no indication as to what other facilities might be included. This vagueness makes the potential ramifications of the Ordinance difficult to predict and evaluate. In order for developers to make an informed decision on the advisability of the proposed Ordinance, the county must define what it is that it proposes to require. Will developers be required to provide evidence of sufficient public school facilities or libraries, for example? At a minimum, the Ordinance should be revised to clearly define what types of capital facilities will be considered when setting up DPOs.

Ordinance May Be Subject to Procedural Due Process Challenge. The Ordinance’s failure to carefully define “capital facilities” may also subject it to challenge under the Due Process Clauses of the U.S. Constitution³⁰ and the Washington Constitution.³¹ The vague definition raises the possibility that the Ordinance could be *applied* differently in different geographic areas. While it may be reasonable for the Ordinance to affect UGAs differently depending on the degree to which capital facilities are available in any given area, inconsistent application of the Ordinance could make it vulnerable to a due process challenge. Since “capital facilities” is not fully defined in the Ordinance, it is likely that the same set of facilities will not be required in every UGA. As a result, there would be little predictability for landowners and developers and

²⁹ Ordinance § 32.xx.030(1) (emphasis added).

³⁰ U.S. Const. Amend. XIV; *see, e.g., Broadnick v. Oklahoma*, 413 U.S. 601 (1973) (“An ordinance is unconstitutionally vague when men of common intelligence must necessarily guess at its meaning.”).

³¹ Wash. Const. Art. I, § 3.

an increased possibility that county actions will lack consistency. In order to satisfy due process requirements, clear standards must be developed and consistently imposed. The county's reliance on undefined, vague standards increases the likelihood that enforcement of the Ordinance would be deemed arbitrary or capricious. The Ordinance should be revised to provide a clear and precise definition of "capital facilities."

Ordinance May Violate Substantive Due Process

Under Washington law, a three-part test is used to determine whether a regulation violates substantive due process: "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner."³² While, the Ordinance is likely to satisfy the first two prongs of this test, it might not satisfy the third.

The Ordinance mechanically imposes DPOs on areas in which LOS are not met for even a single type of identified public facility or service. A developer will be denied the opportunity to even submit an application to the county for review, if the proposed project is in a DPO area. As a result, a developer is given no chance to demonstrate unique circumstances or possible mitigations of a proposed project. For example, a landowner may wish to develop a small commercial enterprise on a single lot that is situated in an otherwise fully developed area, where streets are already operating below stated LOS. The landowner would be precluded from building on that last vacant lot, even though he or she might be more than willing to contribute a fair share toward traffic improvements. Further, this project would be precluded even if the developer is able to show that the project will have no impact on traffic because all employees will utilize readily available mass transportation services. The rigidity of the Ordinance, therefore, is likely to produce unnecessarily drastic consequences for at least some landowners and developers. At times, those consequences are likely to be unduly oppressive, resulting in a violation of substantive due process requirements under Washington law.

Ordinance Could Trigger "Takings" Challenges

Exaction Disproportionate to Project Impact. As structured, the Ordinance requires removal of a DPO before any development, other than single-family homes or duplexes on existing lots, could take place. Removal of a DPO requires a finding that "*all capital facilities identified in the capital facilities plan for the [DPO] are either (i) included or funded in capital improvement programs adopted by either the county or special purpose districts; or (ii) are assured of construction within six years through the formation of local improvements districts, developer financing, or other sources of private funds.*"³³ The Ordinance also provides that "[a] development phasing overlay may be removed for a portion of an overlay area upon a finding that adequate facilities will be provided to allow development in that portion of the development phasing overlay."³⁴

If, in order to remove a DPO, a developer is required to provide or contribute to public facilities to an extent that is out of proportion to the development proposal's actual anticipated impact on

³² *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 330, 787 P.2d 907, 913 (1990).

³³ Ordinance § 32.xx.070(1)(a) (emphasis added).

³⁴ Ordinance § 32.xx.070(2).

those facilities, then the Ordinance *as applied* may result in an unconstitutional “taking” of private property without compensation. Under the “takings” test developed by the U. S. Supreme Court, conditions of approval must satisfy three criteria:

1. The condition must advance an articulated and legitimate government interest;
2. There must be an “essential nexus” between the condition and the articulated government interest, such that the interest is sufficiently connected to and substantially advanced by the condition;³⁵ and
3. The condition must be “roughly proportional” to the project’s expected impact.³⁶

In most cases, where adequate public facilities (“APF”) requirements address the provision of parks, roads, sewers and other public facilities that in fact serve residential development, it is likely that APF requirements would satisfy the first two prongs of the Constitutional test. However, if the only way a developer can proceed with development is by providing sufficient funding to remove a DPO, and that funding substantially exceeds the actual impact of the project on the public service or infrastructure in question, then implementation of the DPO removal requirement might be deemed an unconstitutional taking under the third prong of the test.

Unconstitutional Moratorium. The Ordinance temporarily prohibits all development in areas covered by DPOs, except single-family and duplex homes on existing lots. Essentially, this constitutes a development moratorium. Even though a moratorium is by definition a temporary delay, compensation may be required under the “takings clause” of the U.S. Constitution. Moratoria that are short and otherwise defensible as necessary to protect public health, safety, and welfare are unlikely to be deemed regulatory takings. However, moratoria that deprive a landowner of *all economically beneficial or productive use* of property or that are *longer than reasonably necessary* for the government to plan and/or act might be deemed an unconstitutional taking unless compensated.³⁷

Since the Ordinance allows single-family and duplex homes to be constructed on existing lots, it is not clear whether there may be some landowners that will be deprived of *all* economically beneficial or productive use during the life of a DPO. If that is the case, however, then the Ordinance could result in an unconstitutional taking. Of greater concern is the length of the moratorium. It is not clear how long a DPO will be imposed, but it appears that it could be for as long as twenty years. This is an extraordinarily long time to deprive landowners of the opportunity to make the highest and best use of their lands and may result in substantial adverse economic impact on property owners. The Ordinance may be vulnerable to challenge as a temporary taking if it has not been crafted to be as short as possible in order to address pressing public health, safety, and welfare issues.

³⁵ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

³⁶ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

³⁷ See Meltz, Merriam, and Frank, *The Takings Issue* 280 (Island Press 1999); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (deprivation of all economically beneficial or productive use is a *per se* taking).

Procedure For Removal of DPO Should Be Clarified

The Ordinance provides that a DPO “may be removed from UGA plan maps . . . through the following actions: (a) The county executive makes a finding of adequacy . . . (b) The county council removes the [DPO] by ordinance based on the executive’s finding of adequacy”³⁸ It is not clear from this language that a finding of adequacy will necessarily result in removal of a DPO by the county council. The Ordinance should be revised to clarify that a finding of adequacy mandates the council’s removal of a DPO. Alternatively, if Washington law prevents mandating the council to act based on an executive finding, the Ordinance should be revised to provide that DPOs automatically lapse upon a finding of adequacy by the county executive.

³⁸ Ordinance § 32.xx.070(1).