GordonDerr LLP
ATTORNEYS AT LAW

MEMORANDUM

TO: Gary Chandler, Vice President of Governmental Affairs
Association of Washington Business

FROM: Jay P. Derr

DATE: October 15, 2008

RE: Proposed GMA Amendment Regarding Climate Change

I. Introduction

Our office has been asked to comment on the need for and likely implications of adopting an amendment or amendments to the GMA goals and Countywide Planning Policy (CWPP) provisions to address climate change issues through local GMA plans and regulations. While we have specifically reviewed language that is currently being considered by the CTED land use advisory committee (LUCC) and have included some specific comments regarding that proposed language, the analysis and recommendations contained in this memorandum would be relevant to amendments to the goals and CWPP provisions generally and are not limited to the specific proposal pending before the LUCC.

This analysis and these recommendations are not intended to downplay the significance of climate change and greenhouse gas emission concerns and the merits of addressing what can be addressed through coordinated regional and local planning efforts. Efforts involving SEPA, transportation concurrency, and developer incentives as tools to address climate change at the local planning level should be encouraged. However, in my opinion, imposing a new GMA planning obligation, through amendment to the GMA goals, before the State has provided better definition and guidance regarding how to measure and respond to climate change impacts at the local planning level is more likely to lead to significant, expensive and divisive appeals and litigation, rather than any real success in implementing climate change initiatives at the local level.

Over ten years of personal experience litigating the meaning of and level of requirements for "including best available science" (BAS) in Skagit County's critical areas regulations has, frankly, only confirmed fears that well-meaning but, at least initially, not well-defined GMA amendments can lead to years of expensive and diversionary litigation rather than investment of that same time and money in real, on-the-ground investments that address the agreed need. A

more methodical approach to GMA amendments for greenhouse gas emissions and climate change might avoid much of that litigation and expense.

II. Executive Summary

While local government land use decisions can and should play an important role in reducing vehicle miles traveled and, correspondingly, greenhouse gas emissions, climate change amendments to GMA at this time, in my opinion, are both premature and unnecessary. In fact, they are more likely to result in significant uncertainty, appeals, and litigation rather than any real difference in what types of local land use planning decisions would get made in the near term.

GMA already provides sufficient enabling authority for local governments to address those aspects of local land use planning that have the greatest potential for reducing vehicle miles traveled and greenhouse gas emissions. Compact urban development, elimination of sprawl, linkages between jobs and housing, multi-modal transportation infrastructure and natural resource land, open space, and environmental protection are already centerpieces of the GMA goals and requirements. These existing GMA provisions provide sufficient authority to enable local governments to begin work on local climate change policies.

Adding new goals or other requirements, especially before the State has completed the methodology and modeling guidance specified in previously adopted climate change legislation, is more likely to create confusion, uncertainty, delay, and diversionary appeals and litigation, rather than any greater local initiatives to address climate change, VMT, greenhouse gas emissions and/or fossil fuel consumption. A more logical approach in the near term would be to allow local governments to use the GMA, SEPA, and other regulatory authority already provided in State law, to hold CTED and other State agencies accountable to the deadlines for climate change guidance already identified in existing legislation, and to then develop schedules, additional incentives and, potentially, amendments to SEPA, GMA or other environmental and land use regulatory authority in the future, if the developed guidance identifies the need for additional enabling authority.

III. Analysis

A. Amendment(s) to GMA are Unnecessary: Local Governments have sufficient authority under existing GMA goals.

Several GMA goals already direct local governments to make land use planning decisions on those local issues with potential to affect climate change. Goals 1 (urban growth), 2 (sprawl), 3 (transportation) and 12 (public facilities and services) already link compact urban development, sprawl reduction, multimodal and efficient transportation systems and availability of public facilities and services to where jurisdictions plan to accommodate growth. These goals provide adequate guidance, in my opinion, for local governments to address how and where to put

growth in a manner that reduces vehicle miles traveled and the resulting greenhouse gas emissions and consumption of fossil fuels.

Goals 8, 9, and 10 already address protection of natural resource lands (especially agricultural lands and forest lands), open space, and environmental quality (including air quality) of relevance to climate change concerns. Local government decisions to preserve and protect these valuable resource areas under the existing goals can make important local contributions to protecting lands that provide offset for carbon emissions, without the need for a new amendment.

Adding a new GMA amendment would imply legislative intent to do something more or different than the topics identified above. Assertions that a GMA goal amendment would not lead to new appeals is, in my opinion, an incorrect view of how the growth boards and the courts have interpreted legislative amendments as intending some new or different requirement than the prior language.[1] The very early board decisions recognized that the new GMA amendments did not permit "business as usual."[2] Similarly, board decisions regarding rural development after adoption of the rural amendments to GMA contained lengthy analysis of the intention and new requirements and limitations associated with these GMA amendments.[3]

Without clearer guidance from the State as to what else might be appropriate, or even what benchmarks or measures to rely upon, a GMA goal amendment would leave local governments with a new obligation and not much clarity as to how it should be addressed. This would lead to new appeals and, since compliance with the goals is the basis for determinations of invalidity, under RCW 36.70A.302, could also lead to invalidity of local plans and regulations, which function, essentially, as moratoria until the Board is satisfied with the local plan or regulation[4] ESSB 6580 instructed CTED to identify amendments that might be appropriate to "enable" local government climate change initiatives, not to "require" local governments to develop new (and as yet undefined) local initiatives. Because the existing goals adequately instruct and enable local governments to address the land use, infrastructure, transportation, resource land, and environmental protection that are within local government's purview for greenhouse gas emissions, additional amendments, especially at this time, are not necessary.[5]

---

[1] *See,* e.g., *City of Seattle v. Quezada,* 142 Wash.App. 43, 50-51 (2007).

[2] *See,* e.g., *City of Port Townsend, et al. v. Jefferson County,* WWGMHB No. 94-2-0006 (Aug. 6, 1994).

[3] *See,* e.g., *Burrow v. Kitsap County* and *Alpine v. Kitsap County,* CPSGMHB No. 99-3-0018co/98-3-0032cco (Mar. 29, 2000); *City of Anacortes v. Skagit County,* WWGMHB No. 00-2-0049c (Feb. 6, 2001).

[4] The suggestion in one of the LUCC Tech Team memos that the addition of a GMA goal alone would not trigger new appeals is, I believe, incorrect for two reasons: (1) it will be relatively easy to attach the new GMA goal language to an asserted challenge under other sections of the GMA, such as the comprehensive plan obligations under RCW 36.70A.070 and/or the urban growth obligations under RCW 36.70A.110; and (2) there have been situations where the Board has allowed arguments regarding noncompliance based on a goal alone. See, e.g., *Point Roberts Registered Voters Association v. Whatcom County,* WWGMHB No. 00-2-0052 (FDO, April 6, 2001)(This case found compliance, but only after allowing the challenge and completing the hearing.)

[5] Several local jurisdictions are proceeding with additional local climate change-related policies, which confirms, at least in their view, that additional GMA amendments are not required to enable local government to do so. One of the LUCC Tech Team Background papers notes that the Puget Sound Regional Council has already adopted multi-county planning policies addressing climate change. Seattle and King County have announced intentions to address climate change in their new GMA policies, again without suggesting they need GMA amendments before they can do so.

B. Amendment(s) are Premature: The State should complete other climate change guidance efforts before imposing new GMA obligations on local government.

In addition, amendments to GMA that would add new obligations without State guidance or parameters to guide those local actions are premature. ESSB 6580 included requirements and a schedule (through January 2011) for CTED to complete State guidance regarding methodologies and modeling for local governments to incorporate climate change policies and benchmarks into local planning efforts. This work is not completed. A new amendment now would undermine the sequence of events established by the legislature in ESSB 6580. Once that State framework is completed, local governments will be better equipped to implement any GMA amendments addressing climate change.

As noted above, our office spent over ten years litigating the meaning of GMA's "best available science" (BAS) amendments. Skagit County had the unfortunate privilege of being one of the first jurisdictions to adopt its critical areas regulations (in 1996) after the effective date of those BAS amendments, but prior to much, if any guidance, regarding what BAS was, what "include BAS" meant, or how to apply BAS to local circumstances. That litigation ultimately required resolution at the Washington Supreme Court.[6] Local climate change initiatives would benefit from clearer State guidance before imposing new local obligations, based on lessons learned under BAS amendments.

C. A New Goal or Amendment would impose significant new burdens on local governments, many of which are in the midst of their current round of comprehensive plan updates.

Imposing new GMA climate change obligations through goal amendments before the State has completed its work and guidance regarding the models, benchmarks, and parameters for such local efforts is likely to create significant uncertainty and confusion for local governments trying to comply with this new requirement—especially for local governments who are already part way through their next cycle of 7-year comprehensive plan updates required by RCW 36.70A.130(4). Many GMA jurisdictions are facing deadlines for comprehensive plan revisions between now and 2011 or 2012. In many of those cases, the jurisdictions have begun the planning efforts, including community visioning, population forecasting, and allocation and data collection. GMA case law, while giving deference to local government decisions, nonetheless, imposes fairly substantial "show your work" obligations on local government to demonstrate how they have complied with GMA goals and requirements, especially once presented with a "prima facie" challenge regarding adequacy. If State guidance is not complete, and/or if local government is already part way through its 7-year planning updates and is then forced to show how they considered and addressed new (undefined) climate change obligations, we are likely to see new challenges and new findings of noncompliance and invalidity. There are literally

---

[6] *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415 (2007).

hundreds of board decisions alleging noncompliance and/or invalidity based on the GMA goals. Thus, it borders on the absurd to suggest that adopting new goal language would not lead to new appeals.

ESSB 6580 recognized the link between the methodologies and modeling that the State is obligated to complete with the local comprehensive plan update cycles under RCW 36.70A.130. Deadlines under ESSB 6580 for the State to complete its work extend through January 2011 reports to the Legislature. A more appropriate approach might be to consider GMA climate change provisions after completion of the ESSB 6580 guidance for inclusion in the subsequent (not current) 7-year comprehensive plan update cycle (post 2011).

D. Word choice in a Goal or Amendment can lead to significant uncertainty and litigation over the nature of the obligation and the amount of local discretion.

Board decisions interpreting GMA requirements have demonstrated that specific word choice, including the strength of the obligation implied by certain word choices, could lead to significant local planning obligations and years of expensive appeals (and potentially inconsistent results). Again, the board's handling of the BAS amendments provides a relevant analogy. For several years after the BAS amendments were adopted, local governments were challenged and many found out of compliance with GMA for failing to properly "include" BAS in critical areas regulations. In fact, the boards split on the question of whether those amendments imposed merely a procedural or a more substantive requirement.[7]

Language chosen to add a climate change goal could, potentially, lead to similar uncertainty and litigation. One version of amendment language we reviewed used the phrase "will consider greenhouse gas emissions." A subsequent draft used the phrase "develop land use and transportation patterns that support the State greenhouse gas emission targets." Arguably, land use decisions that are required to support specific State targets impose a significantly stronger mandate than policies that consider greenhouse gas emissions. This stronger language seems especially problematic if it is adopted and imposed on local governments before the State guidance is completed to explain how local governments can model and measure achievement of this obligation. I can only imagine the legal gyrations that will be involved in the interpretation of amendment language that imposes a current obligation to adopt local policies that meet a specified target when the target and the methods to measure and achieve that target at the local level do not yet exist. The best approach, again, seems to be to complete the State guidance identified in ESSB 6580, and to subsequently develop, if necessary, careful legislative language that imposes the proper level of local obligation to address that guidance.

---

[7] Compare the Western Board decision in *Clark County Natural Resources Council v. Clark County, WWGMHB No. 96-2---17 (FDO, December 6, 1996)* and the Eastern Board decision in *EASY v. Spokane County, EWGMHB No. 96-1-0016 (FDO, April 10, 1997)* both finding a substantive BAS requirement with the Central Board decision in *HEAL v. City of Seattle, CPSGMHB No. 96-3-0012 (FDO, August 21, 1996)* finding a procedural BAS requirement only. This dispute ultimately had to be resolved by the appellate courts (*HEAL v. CPSGMHB*, 96 Wn.App. 522 (1999), and has continually been debated and discussed even after *HEAL*. See, e.g., *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824 (2005) and *Swinomish*, 161 Wn.2d 415 (2007).

E. The General Nature of GMA Goals Invites Growth Boards to "Fill the Gaps."

Growth boards have, in the past when GMA provisions were imprecise or incomplete, demonstrated a willingness to fill in gaps in the GMA by broadly interpreting GMA provisions to explain or even add requirements upon local government that are beyond those specified in the language of the statute itself. Minimum urban and maximum rural densities, 25% market factors for land use capacity and heightened scrutiny of low urban density in areas restricted by critical areas are just a few examples of such board interpretations. Several of what were originally referred to as "bright line rules" were developed by the boards over the years as they filled in these gaps. Many of these board interpretations have since been rejected by the courts as usurping local government discretion, but not until after significant litigation and expense.[8] Adding a new goal, with potentially imprecise language and prior to completion of the State guidance that has already been identified as necessary to assist local government efforts regarding climate change and reduction of greenhouse gas emissions has significant potential to open a new round of gap-filling interpretation and appeal.

F. Adding a climate change Goal or Amendment is likely to impose even greater burdens on stressed housing and business sectors at perhaps the worst economic times since GMA enacted.

While not really a legal argument, it is certainly a serious policy argument to consider whether the current economic climate is an appropriate time to add additional obligations on local governments and on the businesses that support growth and development -- in particular, the already significantly stressed housing and business industries. As noted above, GMA already contains substantial goals and requirements that can be used to address greenhouse gas emissions and climate change issues. The GMA goals are intended to be balanced when local governments adopt local plans and regulations. RCW 36.70A.020. While the existing GMA goals also require balancing and consideration of affordable housing, economic development, and property rights, there has not been, to my knowledge, a single growth board decision or court case that has weighed these development-related goals along with the sprawl and environmental protection goals and found a balance in favor of doing more for housing, economic development, or property rights. This suggests that the boards already tend to tip the goal-balancing scale significantly in favor of the goals that impose limits on development discussed above (Goals 1-3, 8-10 and 12). Adding an additional or even amended goal that imposes additional limitations is only likely to tip the balance further away from these goals.

---

[8] *See*, e.g., *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005); *City of Redmond v. CPSGMHB*, 116 Wn.App. 48 (2003), *rev. denied*, 150 Wn.2d 1007 (2003) (Court rejected Board's attempt to impose a higher burden on a local government decision to de-designate agricultural lands.); *Thurston County v. WWGMHB*, ____ Wn.2d ____, 190 P.3d 38 (2008).

G. Any Countywide Planning Policy (CWPP) Amendment should not impose mandates for climate change beyond those within local government authority and discretion to consider and should keep the CWPP direction at the appropriate regional policy level of discussion.

CWPP amendment language raises potential concerns similar to those discussed above for amendments to the GMA goals. In fact, one version of proposed amendment language we reviewed required CWPP amendments to address climate change "that will result in a reduction in greenhouse gas emissions and dependence on foreign oil" (emphasis added). For all of the reasons described above, imposing that level of mandatory result and obligation ("will result in reduction") prior to defined methods to model, measure, or address how this can be achieved at the local level imposes an absolute that is not likely to be achieved. Further, it is even less clear what a local government can do regarding the source of oil (foreign versus domestic), since that is not within the purview of local government to regulate at all, especially not in the context of local land use regulations. Little would be gained from a series of growth board appeals reiterating this failure.

/JPD