PROVIDING PUBLIC FACILITIES UNDER THE GROWTH MANAGEMENT ACT: CONFLICTS, OBSTACLES, AND REMEDIES

A WHITE PAPER

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FOREWORD

This white paper was prepared by Perkins Coie with financial assistance from the Washington Association of REALTORS®. This paper is intended to address policy issues regarding the provision of public facilities under the Washington Growth Management Act. This paper is not intended as legal advice for any particular client or any particular circumstance. Anyone seeking advice on the Growth Management Act should contact a qualified attorney.

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EXECUTIVE SUMMARY

The Washington Growth Management Act ("GMA") has been remarkably successful in transforming the planning and regulation of land development and directing growth in urban areas. Perhaps no GMA requirement is more important than the obligation to provide adequate and timely public facilities and services that accommodate urban growth. Under the GMA, "public facilities" include transportation facilities, water and sewer systems, stormwater facilities, schools, and park and recreation facilities, along with facilities for such public services as fire protection, law enforcement, and other services. GMA jurisdictions must identify in their comprehensive plans the specific public facilities that are necessary to support the growth contemplated by the land use element in their comprehensive plan. GMA jurisdictions must make capital budgeting decisions that are consistent with both the land use element and the public facility plans. Development regulations, including transportation concurrency ordinances, are intended to ensure that the capacity of public facilities is adequate to accommodate growth projections.

Previously, GMA jurisdictions have generally complied with GMA requirements in their planning, assisted by the broad discretion granted to them by the Growth Management Hearings Boards. If, however, tight public budgets and/or voter resistance to additional taxes cause funding for public facilities to fall short of needs, or if public facilities are not actually constructed according to planned schedules, more than noncompliance is at risk—the inadequacy of necessary public facilities becomes an actual restriction on the ability of GMA jurisdictions to accommodate the growth they are obligated to accept. The consequences of such a breakdown could be either a degradation in public facility levels of service below the established standards or higher costs of both residential and nonresidential development because greater developer costs for facilities will be passed along to consumers.

Even with the best intentions to comply with GMA requirements, there are foreseeable scenarios under which GMA jurisdictions could fail to provide adequate and timely public facilities necessary to support growth.

- Because most funding for major public facilities is dependent on bonds, capital levies, grant funds, or a combination of these along with private impact fees, tight public budgets, and voter rejection of tax proposals, the "probable funding" identified in capital improvement programs and transportation improvement programs may fail, creating funding shortfalls.

- GMA jurisdictions may defer expanding public facilities—even those designated as necessary to support growth—to any point within the 20-year comprehensive plan horizon, typically 2012–2015 for current GMA plans, and still remain fully in compliance with the GMA as long as growth-induced public facility needs are ultimately included and funded in a capital improvement plan or transportation improvement plan.

- GMA jurisdictions are not required to eliminate public facility deficiencies or backlogs that existed at the time of the adoption of their comprehensive plan, even though these deficiencies may increase the likelihood that future development proposals will further backlog the system and degrade the level of service below—or further below—minimum standards.

- Public facilities that are not under the ownership or control of GMA jurisdictions—schools, water, sewer, fire, and park facilities owned and operated by special districts, for example—are not subject to the GMA requirement that these facilities be provided in an adequate and timely manner, even though development project approvals may be conditioned on the existence of those facilities.

- Technical assumptions and standards—levels of water conservation, children per household, and vehicle occupancy, for example—that are used to establish public facility needs in support of planned growth may be unduly ambitious, resulting in underplanned and underprovided public facilities that cause greater degradation of levels of service and further jeopardize development projects.

For GMA jurisdictions, the consequences of failure to provide public facilities may appear to be minimal. GMA jurisdictions are granted broad discretion to defer projects, reduce level-of-service standards, alter technical methods and assumptions, and revise land use designations. These jurisdictions, however, are also required by the GMA to provide necessary public facilities within their 20-year plan period or risk noncompliance with the GMA.

For development projects, the consequences of failure to provide adequate and timely public facilities may be worse. Development projects that are deemed to degrade levels of service below established standards may be denied a permit unless a proponent pays to upgrade the facilities. Alternatively, deficient projects may be simply crowded out if land use capacity is revised downward because of lack of necessary public facilities. These actions, in turn, will potentially cause an inconsistency with growth allocations in their respective jurisdictions.

If GMA jurisdictions fail to provide adequate and timely public facilities that are necessary for growth and development projects and are then denied or required to pay for public facilities, development proponents may resort to litigation, either to force action or to recover damages. There are, however, actions that can be taken to postpone or soften a GMA public facilities crisis, even in an environment of inadequate public funding.

- Additional funding sources can be authorized and earmarked for public facilities. New local bonding authority, redesignation to public facilities of a portion of state sales tax receipts from construction activity, or another local option increment in the real estate excise tax for public facilities are possible actions. However, there

are persuasive arguments that each of these approaches is substantially, and perhaps fatally, flawed by being ineffective, unfair, or unlikely to be adopted.

- State legislatures can clearly require GMA jurisdictions to provide all necessary public facilities within a 20-year comprehensive plan period. In addition, a legislature could require timing or phasing components in comprehensive facility plans, or it could authorize agreements between developers and GMA jurisdictions under which developers could advance a necessary public facility funding supported by binding commitments from the GMA jurisdiction to repay the advance within the 20-year plan term.

- Public facility and funding deficiencies and arrearages must be distinguished from the public facility needs that support growth. GMA jurisdictions should be required to identify and measure deficiencies. GMA action-forcing requirements, including concurrency, should recognize identified facility deficiencies by eliminating those deficiencies by applying the concurrency test (i.e., making sure all facilities are functioning at least at minimum standards so that a development proposal is accountable only for its own impacts).

- Because concurrency may become a GMA straitjacket if public facilities are not provided, concurrency should either be repealed or modified by authorizing *de minimis* and incentive exemptions, by expanding the geographic scale of concurrency tests to better utilize existing capacity, or by allowing partial facility funding to be included as additional facility capacity for purposes of concurrency tests.

- All public facility providers, including special districts that provide schools, water, sewer, fire protection, and parks, should be made subject to the full GMA requirements, as intended in the original GMA (as enacted in 1990). The effect would be to require special districts to actually fund and provide the facilities that they plan, consistent with GMA plans.

The application and effects of the GMA framework have become pervasive in public planning and regulation of growth and land development. Adequate and timely provision of public facilities—the essential implementation mechanism in GMA growth management—may be at the tail end of the GMA "hierarchy," but it is also the linchpin that holds the GMA together. Failure to provide adequate and timely public facilities is a foreseeable scenario in this decade as capital budgets are shortchanged to cover other pressing needs. The obvious solution is to locate and designate more funds for GMA public facilities, but that solution is unlikely to succeed in an environment of declining public budgets and voter resistance to taxes.

There are, however, other actions that will allow a more efficient utilization of public facility capacity and more flexible approaches to funding facilities that are necessary to

support urban growth. Many strategies will require new legislative authority. Even implementation of all such actions, however, will not obviate or substitute for the adequate and timely provision of public facilities necessary to support urban growth. Nevertheless, the actions will help in averting a real crisis and will continue to allow the accommodation of growth in urban areas, as required by the GMA.

PROVIDING PUBLIC FACILITIES UNDER THE GROWTH MANAGEMENT ACT: CONFLICTS, OBSTACLES, AND REMEDIES

I. INTRODUCTION

There is little question that the Washington Growth Management Act ("GMA")[1] has transformed the planning and regulation of land development throughout Washington State. The GMA established a mandatory "bottom-up" scheme under which most counties and cities are required to plan to accommodate an allocated share of population growth within designated urban growth areas ("UGAs") and, at the same time, designate and protect critical environmental areas, natural resource lands, and rural areas from the impacts of development. After more than a decade of planning under the GMA, most participating local governments have complied with the GMA by adopting (1) comprehensive plans that include consistent land use, transportation, and capital facilities plan elements and (2) development regulations and public facility improvement programs that are consistent with and implement the GMA's provisions.

Despite clear progress to date, however, some of the core requirements of the GMA have produced, and are likely to continue to produce, conflicts, disagreements, and disputes as local governments, developers, property owners, and voters attempt to coexist under the GMA framework.

- The overarching priority of accommodating growth within designated UGAs may be increasingly difficult to support with adequate and timely public facilities due to tight public budgets and voter resistance to additional taxes.
- Accommodating growth in UGAs, particularly employment growth within urban centers, may be impossible without violating established levels of service for public facilities that must be maintained under GMA concurrency requirements (especially transportation facilities).
- The GMA mandate to accommodate growth in denser and more compact urban areas may be inconsistent with the increasing priority placed on critical areas, preserving wildlife habitat, and water quality through implementation of endangered species, shoreline development, and stormwater management rules.
- Compact urban development and sprawl reduction under the GMA may contribute to increased land prices in UGAs and thereby conflict with the GMA goals of affordable housing and economic development.

[1] The GMA is codified primarily in Chapter 36.70A RCW.

- Protection of rural areas, rural critical areas, and natural resource lands from development may reduce property values and deprive rural residents of economic development opportunities.

The inherent conflicts among otherwise worthy goals and the statutory requirements of the GMA may be endlessly litigated unless and until they can be resolved by modifying the public policies that have created the conflicts.

Perhaps none of these conflicts is more important than the conflict that arises from the need to provide adequate and timely public facilities to support the accommodation of growth in UGAs and the lack of funds to do so. In the GMA "hierarchy of substantive and directive policy,"[2] the provision of public facilities is at the tail end of the process—an implementing mechanism for policies and plans to accommodate growth. However, the GMA requires that these public facilities actually be provided to support the growth that each local jurisdiction has a duty to accommodate.

For a GMA county or city, failure to provide public facilities risks GMA noncompliance and possibly a mandatory revision of its comprehensive plan. For development projects, the lack of adequate and timely (i.e., concurrent) public facilities risks permit denial or substantial additional costs in providing the facilities privately. For property owners and voters, accommodating growth without providing public facility improvements means degradation of service levels.

Unfortunately, the second decade of the GMA has started at a time of tight public budgets and reduced revenue expectations, raising the prospect that even committed public improvement projects may not be constructed on a timely basis or may be indefinitely deferred. The Central Puget Sound Growth Management Hearings Board ("GMHB") has recently acknowledged the inherent conflict created by the GMA between accommodating development within UGAs and meeting the GMA requirement of providing adequate public facilities.[3] More and more conflicts arising out of this obligation to provide adequate public facilities and the lack of funds to do so can be expected.

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[2] The local government planning mandated under the GMA may be characterized as a "hierarchy of substantive and directive policy" that flows in one direction. *City of Snoqualmie v. King County,* CPSGMHB No. 93-3-0005, Final Decision and Order at 24 (Oct. 4, 1993). Each state's Office of Financial Management allocates the state's 20-year population growth forecast to counties. To accommodate this growth, counties designate urban growth areas, population suballocations, and the planning policies for local comprehensive plans. The comprehensive plans provide substantive direction to the content of the development regulations, such as zoning, and to the capital facilities that can be authorized and funded. The regulations and the capital facilities govern the exercise of local land use powers and permitting. Perkins Coie LLP, *The Washington Growth Management Act After Ten Years: The Duty to Accommodate Growth at 4* (Jan. 2002).

[3] See *Bennett v. City of Bellevue*, CPSGMHB No. 01-3-0022c, Final Decision and Order at 9-10 (Apr. 8, 2002) (involving a conflict between a proposal for redevelopment within the UGA and the applicable GMA transportation concurrency requirements).

Thus, this is an appropriate time to examine the issues arising from that obligation. Are counties and cities actually funding and otherwise providing for their committed public facility improvement projects on a concurrent basis? What future scenarios are likely to prevent even funded projects from actually be implemented? How may GMA jurisdictions respond to funding shortfalls or other unforeseen impediments in providing public facilities while remaining compliant with the GMA? What are the consequences for land use plans, development regulations, and development proposals if public facilities are not adequately and timely provided? In other words, is the public facilities requirement of the GMA the Achilles' heel of the GMA that could potentially undermine the entire GMA hierarchy and actually prevent the management of growth?

II. GMA PUBLIC FACILITIES REQUIREMENTS

A. Consistency Under the GMA

The core of the GMA is the comprehensive plan, mandatory for all jurisdictions subject to GMA planning. All GMA comprehensive plans must be consistent in at least three ways: (1) between each city and its county plans and policies, (2) between a jurisdiction's plan and its development regulations and capital facilities, and (3) among the elements of each jurisdiction's plan. RCW 36.70A.040, .070, .100. All GMA comprehensive plans must include at least the following elements: (1) land use, (2) housing, (3) capital facilities, (4) utilities, (5) transportation, and (6) shoreline master program.[4] County plans must also include a rural element. RCW 36.70A.070, .480.

GMA comprehensive plans and their supporting development regulations, capital facilities, and transportation elements must accommodate an allocated share of population growth within designated UGAs. RCW 36.70A.110(2). Within the UGAs, the location of existing public facility and public service capacities should determine priority locations for accommodating that growth—a GMA provision known as "tiering." Under the GMA, future growth should be located first in areas of UGAs that have existing public facility and service capacities to serve new development, second in areas of UGAs that will be served adequately by a combination of existing and new public facilities and services, and third in the remaining portions of UGAs that will require new public facilities and services that are to be provided by either public or private sources.[5] RCW 36.70A.110(3).

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[4] The 2002 Legislature added two mandatory elements for all GMA comprehensive plans: (7) economic development, and (8) park and recreation elements, but made this addition contingent on funding. Laws of 2002, ch. 154 §1.

[5] See *Association of Rural Residents v. Kitsap County*, CPSGMHB No. 93-3-0010, Final Decision and Order at 46 (June 3, 1994); *C.U.S.T.E.R. Ass'n v. Whatcom County*, WWGMHB No. 96-2-0008, Final Decision and Order at 6 (Sept. 12, 1996).

Comprehensive plans and development regulations must "ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."[6] RCW 36.70A.020(12). Public facilities include "streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools." RCW 36.70A.030(12). Public services include "fire protection and suppression, law enforcement, public health, education, recreation, environmental protection, and other governmental services." RCW 36.70A.030(13). Physical facilities for those public services may also be encompassed within the term "public facilities" as it applies to GMA comprehensive plans.[7] Thus, GMA "public facilities" incorporates both capital facilities and transportation facilities.

B. Capital Facilities

The capital facilities element ("CFE") of the comprehensive plan must include the following components:

- an inventory of existing capital facilities owned by public entities (i.e., public facilities as defined by the GMA);[8]
- a forecast of the future needs for such capital facilities based on allocated growth targets;
- the proposed locations and capacities of expanded or new capital facilities;
- at least a six-year plan that will finance such capital facilities, within projected funding capacities and including sources of public moneys for such facilities; and

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[6] This requirement is expressed in a GMA planning goal, but comprehensive plans must comply with the substantive effect of GMA planning goals. *Diehl v. Mason County*, 94 Wn. App. 645, 660 (1999); *Rabie v. City of Burien*, CPSGMHB No. 98-3-0005c, Final Decision and Order at 4 (Oct. 19, 1998). The requirement in this goal is essentially a "concurrency" requirement for all public facilities.

[7] *McVittie v. Snohomish County*, CPSGMHB No. 01-3-0002, Final Decision and Order at 14 n.17 (July 25, 2001) (*"McVittie VI"*).

[8] "Public facilities as defined at RCW 36.70A.030(13) are synonymous with 'capital facilities owned by public entities'" for purposes of the inventory required under RCW 36.70A.070(3)(a). *West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 94-3-0016, Final Decision and Order at 31 (April 4, 1995) (*"WSDF I"*). The inventory of such capital facilities must include even those public facilities not owned or operated by the planning jurisdiction (e.g., county or city), such as public facilities owned by school districts, water and sewer districts, etc., but the planning jurisdiction is required to plan only for facilities that it does own or operate. *Sky Valley v. Snohomish County*, CPSGMHB No. 95-3-0068c, Final Decision and Order at 50 (March 12, 1996). See also *Wenatchee Valley Mall Partnership v. Douglas County*, EWGMHB No. 96-1-0009, Final Decision and Order at 17 (December 10, 1996).

- a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure consistency among the land use element, capital facilities element, and financing plan.

RCW 36.70A.070(3). In addition, authorization to collect and expend GMA impact fees under Chapter 82.02 RCW requires that the CFE identify:

- deficiencies in public facilities serving existing development and the means by which existing deficiencies will be eliminated within a reasonable time period;
- additional demands placed on existing public facilities by new development; and
- additional public facility improvements required to serve new development.

RCW 82.02.050(4). This information is only required, however, if the jurisdiction collects GMA-authorized impact fees.

All GMA counties and cities must conform their annual capital improvement programs ("CIPs"), which represent their capital budgeting decisions,[9] to the comprehensive plan CFE and its financing plan. RCW 36.70A.120. Moreover, CFEs and CIPs are subject to GMA Planning Goal 12 requirements that a level of service standard be established for each public facility, that facilities and services necessary to support growth must be adequate and timely to serve new development, and that existing levels-of-service may not be degraded.[10] RCW 36.70A.020(12). *The GMA, however, does not impose a sequence or timing for the funding and provision of capital facilities necessary to support growth. The GMA requires only that the growth-induced capital facility needs identified in the CFE must be included and funded in a CIP at some point within the 20-year horizon of the GMA comprehensive plan.*[11]

While a GMA jurisdiction is not required to plan for public facilities and services that it does not own or operate,[12] the CFE must still indicate what infrastructure is needed to

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[9] A multi-year CIP (or capital budget) as part of the annual budget cycle is typically required in county and city charters, and is required by the state auditor for public budgets.

[10] *McVittie v. Snohomish County*, CPSGMHB No. 99-3-0016c, Final Decision and Order (February 9, 2000) at 15-16 (*"McVittie I"*). A single minimum baseline level of service standard for each public facility must be established. If a range of service standards is provided, the baseline standard is the minimum level of service in the range. *Id.* at 18.

[11] *McVittie v. Snohomish County*, CPSGMHB No. 00-3-0006c, Final Decision and Order at 11 (Sept. 11, 2000) (*"McVittie IV"*).

[12] The owner or operator is typically a special purpose district with its own planning and capital budgeting authority, such as a school district, water district, sewer district, fire district, park district, etc. Boundaries of the special purpose district are rarely coterminous with those of the GMA jurisdiction and often include multiple GMA jurisdictions. The original GMA legislation included special purpose districts within

support future growth and must contain a firm commitment and strategy to meet those needs. For public facilities not owned or operated by the jurisdiction, this commitment and strategy may necessitate obtaining assurances from the owner or operator that the facilities will be adequate and available to support planned growth within the UGA.[13] Moreover, a GMA jurisdiction may condition development projects by requiring that public facilities be in place or committed, even those that the GMA jurisdiction does not own (e.g., adequate school capacity).[14] The GMA jurisdiction, however, will not be held accountable for the adequate and timely provision of public facilities it does not own.

C. Transportation Facilities

The comprehensive plan transportation element ("TE") must include the following components (among others):

- land use assumptions, based on the comprehensive plan land use element, used in estimating future travel in a jurisdiction;
- facilities and services needs, including:
  - a current inventory of transportation facilities in the jurisdiction, including those owned by the state;
  - level of service standards for all locally owned and state-owned arterial roads and transit routes;[15]
  - forecasts of traffic for at least ten years, based on the land use element to determine the location, timing, and capacity needs of future growth; and
  - identification of state and local system needs to meet current and future needs, including facility improvements currently below applicable standards;
- a financing plan for identified needs, including:
  - an analysis of funding needs versus funding resources available;

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the scope and requirements of the GMA, but this section was vetoed by Governor Gardner. Laws of 1990, 1st Ex. Sess., ch. 17 §18.

[13] *City of Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039c, Finding of Noncompliance and Determination of Invalidity at 32 (Sept. 8, 1997).

[14] *Burrow v. Kitsap County*, CPSGMHB No. 99-3-0018, Final Decision and Order at 17 (March 29, 2000). "Development proposals" include subdivisions, site development, and any other projects that require land use permits under applicable development regulations.

[15] For state-owned facilities, the level-of-service standards are as prescribed in Chapters 47.06 and 47.80 RCW and are intended only to monitor performance of those facilities and to coordinate with the local and state transportation improvement programs. No local concurrency requirements apply to state facilities. RCW 36.70A.070(6)(a)(iii)(C). See *McVittie v. Snohomish County*, CPSGMHB No. 01-3-0017, Final Decision and Order (Jan. 8, 2002) at 11-12 (*"McVittie VIII"*).

- a multi-year financing plan for the identified needs that can serve as the basis for the six-year transportation improvement program ("TIP") required for counties, cities, and transit systems;[16] and
- a discussion of how additional funding will be raised or how land use assumptions will be reassessed if financing plan funding falls short of meeting needs; and

- demand management strategies and interjurisdictional impacts.

RCW 36.70A.070(6)(a). Thus, all GMA counties and cities must base their TE traffic forecasts and transportation facility needs determinations on the comprehensive plan land use element and must conform their annual TIPs to the TE and its financing plan.[17]

D. Action-Forcing Requirements

The GMA requirements for transportation facilities and other public facilities appear to be mostly similar and parallel. Level-of-service standards are required, facilities necessary to support growth must be adequate and timely to serve new development, and existing levels of service may not be degraded by demands from new development. *The Central and Western Boards have determined that these requirements establish an objective test for new development—if a development proposal places additional demands on a local jurisdiction's public facilities that would degrade the level of service below locally adopted minimum standards, then the GMA forces action by the local jurisdiction.*[18]

For public facilities other than transportation facilities, the jurisdiction must: (1) fund additional facility improvements that would avoid degradation, (2) reduce the level-of-service standard for the affected public facility,[19] or (3) reassess its land use element, possibly

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[16] The six-year TIP is required for counties under RCW 36.81.121, for cities under RCW 35.77.010, and for public transportation systems under RCW 35.58.2795. These TIPs should be coordinated with the six-year improvement program required by RCW 47.05.030 for the Washington State Department of Transportation. RCW 36.70A.070(6)(a)(iv)(B).

[17] GMA jurisdictions have the same discretion in funding and implementing the transportation facilities identified in their TIPs as necessary to support growth as they have for capital facilities (i.e., at some point within the 20-year life of the comprehensive plan). *McVittie IV* at 16.

[18] *Taxpayers for Responsible Government v. City of Oak Harbor*, WWGMHB No. 96-2-0002, Final Decision and Order at 4-5 (July 16, 1996); *McVittie I* at 18-19. GMA Planning Goal 12 "explicitly provides an action-forcing requirement if public facilities cannot support development without decreasing levels of service below the locally established minimum standards. This provision of Goal 12 is supported by RCW 35.70A.070(3) and (6), which include specific mechanisms to trigger a reevaluation action by the local government." *McVittie I* at 18.

[19] There is no apparent limit under the GMA to the discretion of jurisdictions in establishing or reducing their level-of-service standards for public facilities. GMHBs have upheld transportation standards

including the amount or location of development permitted under the GMA comprehensive plan and development regulations.[20] Although the GMA does not "require" a jurisdiction to deny the development proposal, a jurisdiction could be found noncompliant if the project is approved and the required remedial procedures are not followed, or if GMA consistency is not maintained.

For transportation facilities, the GMA requires an additional action-forcing mechanism. All GMA jurisdictions must adopt ordinances that prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the TE, unless transportation improvements or strategies to accommodate the impacts of the development are provided concurrent with the development.[21] RCW 36.70A.070(6)(b). "Concurrent with the development" means that the improvements or strategies are in place or are financially committed within six years. *Id. The Central and Western Boards have held that GMA jurisdictions may not provide for any exemptions to the concurrency requirement, even for small impacts or beneficial objectives.*[22]

GMA jurisdictions have considerable discretion in accomplishing the concurring requirement in their ordinances. First, there is flexibility in providing adequate and timely facilities for development. Funding commitments may be public, private, or a combination of both, and they may be contingent on a local vote or other agency funding. Demand reduction or technological improvement strategies may allow more development to meet adopted level-of-service standards. Second, GMA jurisdictions may adopt any professionally accepted methodology to establish and monitor level of service standards as an implementation of the

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alleged to allow "failing roads" and "gridlock." *Achen v. Clark County*, WWGMHB No. 95-2-0067, Final Decision and Order at 27 (Sept. 20, 1995); *WSDF I* at 43-44.

[20] RCW 36.70A.070(3); *McVittie I* at 19. Other options may be available, including revision of technical assumptions or methods concerning new technology to produce the same facilities for less cost or strategies to reduce demand on the facilities. *See McVittie I* at 19.

[21] The GMHBs have determined that this concurrency requirement applies only to transportation facilities and not to all public facilities for which level-of-service standards and nondegradation apply. *Taxpayers for Responsible Government* at 5; *McVittie I* at 21. However, adopting a concurrency ordinance for nontransportation public facilities is not prohibited under the GMA and thus is within local discretion. *McVittie I* at 21.

[22] *Bennett v. City of Bellevue*, CPSGMHB No. 01-3-0022c, Final Decision and Order at 10-11 (Apr. 8, 2002) at 10-11 (rejecting an exemption for certain commercial rehabilitation encouraged by the City); *Progress Clark County, Inc. v. City of Vancouver*, WWGMHB No. 99-2-0038c, Final Decision and Order at 6 (May 22, 2000) (rejecting an exemption for impacts of less than ten trips). The Central Board noted that exemptions are commonplace in GMA jurisdiction concurrency ordinances, including many other exemptions adopted by the City of Bellevue not at issue in the appeal. *Bennett* at 8, 11 n.5.

plan standards and the concurrency ordinance.[23] Moreover, jurisdictions may modify their previously established methodology without amending the comprehensive plan, even if the effect is a degradation of traffic conditions.[24] Third, failure of the local concurrency test by a development proposal may not require outright permit denial if the developer can mitigate the traffic impacts of the proposal during the analysis period or if the jurisdiction modifies its measurement methodology or can demonstrate additional funding for improvement projects.[25]

Finally, GMA jurisdictions are authorized to impose impact fees on development proposals to fund off-site public facility improvements included in their CFEs, but only for improvements that: (1) are reasonably related to the development, (2) do not exceed a proportionate share of costs of public facilities reasonably related to the development, and (3) reasonably benefit the new development.[26] RCW 82.02.050(3). *These impact fees have recently been held to exclusively preempt the field of off-site facility fees on development projects.*[27] Development impact fees may not be based on or used to cure existing

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[23] Most methodologies include volume/capacity ratios or a mobility index for road segments, intersections, or screenlines (multiple segments), applied at a zonal or corridor level. See *Montlake Community Club v. Central Puget Sound GMHB*, 110 Wn. App. 731, 738-39, 43 P.3d 57 (2002) (citing *WSDF I* at 60); *Progress Clark County, Inc. v. City of Vancouver*, WWGMHB No. 99-2-0038c, Final Decision and Order at 5-6 (May 22, 2000).

[24] *Sammamish Community Council v. City of Bellevue*, 108 Wn. App. 46, 56-57, 29 P.3d 728 (2001). The court held that an ordinance modifying the calculation of traffic volumes for a volume/capacity analysis was not a "zoning ordinance" (even if the modification could affect land use) and did not change the level-of-service standards established in the GMA comprehensive plan. However, the Western Board held that a county was noncompliant with the GMA for adopting a TE that applied one methodology to minimize facility deficiencies and a TIP that applied another methodology to maximize deficiencies to obtain grant funding. *Butler v. Lewis County*, WWGMHB No. 99-2-0027c, Final Decision and Order at 37 (June 30, 2000).

[25] RCW 36.70A.070(6)(b). *See also Progress Clark County* at 3. The concurrency time period is six years. Developer mitigation to meet the concurrency test may be "voluntary" and thereby not be a GMA or transportation impact fee authorized under Chapter 82.02 RCW or Chapter 39.92 RCW, respectively.

[26] The GMA impact fee scheme expressly exempts from its restrictions the imposition of transportation impact fees authorized under Chapter 39.92 RCW. RCW 82.02.020. However, such transportation impact fees must also be reasonably related to impacts of a development, must be proportionate to the development impacts, and must be applied to improvements that mitigate impacts of the development. RCW 39.92.030(4). The improvements must be based on a transportation plan and annual transportation improvement program. RCW 39.92.030(2), (3). The GMA impact fee statute also exempts "voluntary agreements" for payments in lieu of dedications or to mitigate development impacts, but the responsible jurisdiction must still establish that a payment is reasonably necessary as a direct result of the development and is expended only on an agreed improvement to mitigate the impact. RCW 82.02.020. GMA impact fees may not be imposed on the same development proposal for the same improvements for which SEPA mitigation fees are required. RCW 82.02.100; WAC 197-11-660(1).

[27] *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 753, 49 P.3d 867 (2002). The court held that only an individualized determination of development project impacts on public facilities will

deficiencies in public facilities or on estimated public facility requirements for general anticipated future growth.

E. Summary of GMA Requirements

Courts and the GMHBs are gradually bringing local jurisdictions into compliance with the GMA's requirements to provide public facilities necessary to support growth under the GMA consistency requirement. Compliance requires (1) consistency between the comprehensive plan land use element, capital facilities element, and transportation element, (2) consistency between comprehensive plan elements and development regulations, including concurrency ordinances, and (3) consistency between comprehensive plan elements and capital budgeting decisions, including CIPs and TIPs. GMHB decisions increasingly find compliance by local jurisdictions with these consistency requirements.

Nevertheless, the public facility consistency requirements of the GMA represent important potential restrictions on the ability of local jurisdictions to actually meet the GMA goals of accommodating allocated growth within designated UGAs and of thereby discouraging urban sprawl.[28] Perhaps in recognition of this potential conflict, the courts and the GMHBs have granted considerable discretion and flexibility to local jurisdictions in meeting GMA public facility level-of-service and concurrency requirements. Establishment of level-of-service standards for public facilities, determination of the measurement for those level-of-service standards, and the methodology for the measurement, modification of the measurement methodology, and technical assumptions in strategies and funding for public facility improvements are all within the discretion of each local planning jurisdiction.

But what happens if the assumptions are wrong, if the public facility funding falls short of requirements, or if public facilities are not actually constructed according to the planned schedule? Then, failure to provide public facilities necessary to support growth becomes more than a noncompliance issue—the inadequacy of necessary public facilities becomes an actual restriction on the ability of GMA jurisdictions to accommodate growth. The consequences could be a breakdown in the accommodation of growth in urban areas or a significant increase in provision of public facilities by developers, leading to higher costs that are passed along to

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meet the impact fee authorization in RCW 82.02.020. "We have repeatedly held, as the statute requires, that development conditions must be tied to a specific, identified impact of a development on a community." *Isla Verde*, 146 Wn.2d at 761. This holding was also implicitly supported in the court's limited concurrent decision in *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 49 P.3d 860 (2002). Neither decision addressed any relationship between these statutory impact fees and impact mitigation fees authorized under SEPA, Chapter 43.21C RCW.

[28] "The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations . . . : (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. . . ." RCW 36.70A.020.

property owners and users.

III. FAILURE TO PROVIDE ADEQUATE PUBLIC FACILITIES

A. Introduction

At its heart, the GMA public facilities requirement is that land use plans for urban growth areas must be supported by CFEs and TEs that identify facilities requirements necessary for growth, establish acceptable minimum levels of service on existing facilities, and set forth financial plans that will accomplish these facilities requirements. The GMA also requires that GMA jurisdictions implement their plans through annual CIPs and TIPs that are consistent with the CFE/TE facilities plans and that demonstrate funding for facilities, which is required within six years. If the facilities cannot be funded or if development proposals would degrade levels of service below the adopted minimum standards, the GMA forces certain actions to rebalance the public facilities planning and implementation.

GMA jurisdictions must actually accommodate allocated growth within their designated urban growth areas and must actually provide public facilities that will support this growth without degrading existing levels of service. In many jurisdictions, the allocated growth cannot be accommodated without additions to existing public facilities. However, GMA plans and improvement programs do not assure that the additional public facilities necessary to support growth will actually be constructed in an adequate and timely manner, even with development impact fees authorized to assist in the funding and provision of public facilities. In reality, there are significant vulnerabilities in the scheme such that the timely provision of adequate public facilities to support development could fail. If adequate public facilities are not in place to support growth, a number of adverse consequences could result, undermining the GMA scheme.

B. Funding Shortfall

Financing of those public facilities identified as necessary for growth in the CFE/TE and the CIP/TIP may be dependent on uncertain grant funds or public votes. Most funding for major public facilities, including water, sewer, stormwater, and transportation, is obtained from a variety of sources. Applications for grants from state and federal governments must be filed during the applicable funding period and are subject to competition for limited grant fund appropriations. Capital levies and bonds requiring voter approval are available only at defined time periods and are subject to statutory limits. Accordingly, the GMA standard for the financing of public facilities is identification in the CIP or TIP only of "probable funding" for the facility improvements designated in the CFE or TE as necessary to support growth.[29]

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[29] *McVittie I* at 19. "In order to determine whether [a jurisdiction] is experiencing a shortfall in funding, the question is simply, have the needs identified in the CIP, as derived from the CFE (and supporting

In an era of ever tighter public budgets and voter resistance to tax proposals, the actual occurrence of funding shortfalls for public facility improvements becomes a very realistic scenario. If "probable funding" for programmed improvements fails to materialize, whether through failure of grant funding or voter disapproval or otherwise, the responsible jurisdiction must raise additional funds, reassess its land use assumptions, or reduce the facility level of service.[30] All of these options comply with GMA requirements, but the real world consequence is often a delay in actual construction of public facilities necessary to support growth. If comprehensive plan land use assumptions are reduced as a result of a shortfall, development in the jurisdiction may be squeezed and consistency with other jurisdiction land use plans and with countywide policies may be jeopardized. If unfunded or delayed facilities are transportation facilities, development projects may be exposed, through local concurring ordinances, to delay, denial, or additional cost. If GMA or transportation impact fees have been imposed on a development but have not been expended on (or committed to) the designated public facilities within six years, refunding of those fees to the property owner is required, thereby worsening the public facility funding shortfall.[31]

C. Deferral of Public Facility Improvements

GMA jurisdictions are granted considerable discretion in scheduling and budgeting public facilities projects that they have designated as necessary to support growth. As long as growth-induced needs identified in a 20-year comprehensive plan CFE and TE are ultimately included and funded in a six-year CIP and TIP, an implementation schedule decision, including a decision to defer a project to later years, is a discretionary choice of each jurisdiction.[32] *In other words, GMA jurisdictions may defer the funding and construction of public facilities—even those designated as necessary to support growth—to any point in their 20-year plan horizon (typically 2012-2015 for GMA plans) and remain fully in compliance with the GMA.* The GMA requires only that all CFE/TE projects be funded within the 20-year period of each

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documents) been funded." *McVittie IV* at 10. Identification of funding agencies as a probable source of funding improvements is "probable funding" as required by RCW 36.70A.070(6)(a)(iv)(C). *Id.* at 14. CIPs and TIPs may distinguish between project funding that is "committed" and that which is not yet committed by an identified funding source. *Id.*

[30] All of these options may require amendment of the comprehensive plan, subject to restrictions on timing of amendments and public participation procedures.

[31] RCW 82.02.080(1). GMA impact fees must be expended or encumbered on public facilities intended to benefit the development on which they are imposed within six years of payment. Public facilities include public streets and roads, public parks, open space, recreation facilities, school facilities, and fire protection facilities. RCW 82.02.090(7). Transportation impact fees must also be refunded if not expended on designated projects within six years after collection. RCW 39.92.030(5).

[32] *McVittie IV* at 11, 16. Postponing projects during the early or middle years of a 20-year planning horizon does not create a funding shortfall, but postponed projects ultimately must be addressed at some point during the original 20-year life of the comprehensive plan. *Id.* at 17.

comprehensive plan.[33] Of course, the more often public facility projects are deferred to the final six-years of 20-year plan period, the more improbable will be the adequate and timely funding of all programmed projects during that budget window, with the consequent risk of GMA noncompliance.

Although GMA counties and cities may remain in compliance with the GMA while deferring needed public facility improvements, development projects may not be so fortunate. Under the GMA, if a development project places additional demands on a jurisdiction's public facilities that would degrade the level of service below locally adopted minimum standards, the jurisdiction must take action to avoid the degradation by (1) funding facility improvements, (2) reducing the level-of-service standard, (3) reassessing its land use element, or, if transportation concurrency is required, (4) denying the proposal if the proponent does not sufficiently improve the facility.[34] Presumably, this test applies to development proposals even while provision of public facilities has been deferred.

Thus, the discretion available to GMA jurisdictions in scheduling and funding public facilities shifts the risk of GMA compliance to development projects. Under concurrency, if a jurisdiction defers needed transportation improvements, development projects may be denied or forced to rely on private funding for the facilities in lieu of denial. Development projects will also face delay if a land use reassessment causes a jurisdiction to violate the GMA requirement for consistency across all plans and policies in each county.[35]

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[33] It is not clear at this time how the required revisions to comprehensive plans (5 years) and urban growth areas (10 years) will affect this discretion on budgeting for capital facilities. RCW 36.70A.130(1), .130(3), .215(4). Any of these revisions could extend a comprehensive plan and its CFE and TE for another 20 years (required under RCW 36.70A.130(3)). To the extent that existing capital facilities necessary to support growth have been deferred and not funded, these facilities could be in arrears under a new plan.

[34] RCW 36.70A.070(3), (6)(b); *McVittie I* at 20-21. It is clear that for such a development project to be approved the applicable facility improvements must be committed for construction within six years from the date of approval, either by public or private funding. Timing is not so clear when other actions by the responsible jurisdiction (i.e., reducing the level-of-service standard or reassessing the land use element) would be required to permit approval of the development.

[35] Actions by a jurisdiction as a result of a land use reassessment could be invalidated by the relevant GMHB (upon challenge) if the GMHB determines that the actions produce inconsistency in violation of the GMA. Development proposals may not vest under invalidated ordinances during the period of remand to the jurisdiction for amendment to comply with the GMA, with certain *de minimis* exceptions. RCW 36.70A.302(3).

D. Existing Deficiencies and Funding Arrearages

The GMA public facility scheme does not directly address public facility funding backlogs, or arrearages, as of the date of a comprehensive plan or the date of a CIP or TIP.[36] *While public facility deficiencies and improvement project funding backlogs are problems faced by many jurisdictions, the GMA does not impose a duty or requirement to eliminate or even reduce deficiencies and backlogs.*[37] Instead, GMA jurisdictions are required to provide public facilities necessary to support the 20-year growth they are allocated. Thus, despite political pressure to program and fund improvements to existing public facilities in order to remedy deficiencies that may have resulted from previous deferrals or funding shortfalls, counties and cities will not necessarily be noncompliant with the GMA by excluding facility arrearages from their CFEs/TEs or their CIPs/TIPs.[38] Only if a jurisdiction collects GMA impact fees will it be required to identify these arrearages.

Nevertheless, facility arrearages may still affect development projects under GMA requirements. *First*, public facility deficiencies may cause development projects to place demands on the facilities that would degrade the level of service below or further below the minimum standards. If public facilities cannot support development without decreasing levels of service below the locally established minimum standards, then the GMA forces action by the responsible jurisdiction.[39] *If concurrency is required, development proposals may be denied, even if a concurrency failure is primarily caused by existing deficiencies.* Once action is forced, a jurisdiction must bring its facilities up to minimum standards, either by funding improvements or by lowering the level-of-service standards. *Second*, to the extent that facility arrearages are included in CIPs and TIPs to be improved with committed funding,

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[36] Under the GMA, a public facility is "in arrears" if the facility is operating at a level of service below established minimum standards and no rectifying facility improvement project is programmed or funded that will remedy the deficiency within six years. *Hensley v. Snohomish County*, CPSGMHB No. 02-3-0004, Final Decision and Order (June 17, 2002) (*"Hensley V"*) at 17.

[37] *McVittie IV* at 11, 15; *WSDF IV* at 26. In *McVittie IV*, the GMHB concurred with the county's contention that funding improvements to certain transportation facility deficiencies (i.e., operating below the level-of-service standard) was fruitless because the deficiencies were caused by state highway deficiencies.

[38] However, RCW 82.02.050(4)(a) requires that GMA jurisdictions, in order to be authorized to collect and expend GMA impact fees, must identify in their capital facilities plan "deficiencies in public facilities serving existing development and the means by which existing deficiencies will be eliminated within a reasonable time frame." In addition, if probable funding falls short of meeting existing public facility needs, a GMA jurisdiction has a duty to take some action under the GMA, such as reducing the applicable level-of-service standards or reassessing the comprehensive plan land use element. *WSDF I* at 33-34.

[39] *McVittie I* at 18. The Central GMHB drew this conclusion from GMA Goal 12 (RCW 36.70A.020(12)) in conjunction with the requirements of RCW 36.70A.070(3) and (6). The GMHB did not explicitly address situations where the decrease in level of service starts from a level below the adopted minimum standard.

those arrearages will compete for public funding with public facilities that have been identified as necessary to support growth. Increased competition for scarce funds will likely cause further deferrals that will negatively affect development projects within the jurisdiction.

E. Public Facilities and Special Purpose Districts

Public facilities that are not under the ownership or control of GMA jurisdictions present special problems. These facilities, including schools, water and sewer systems, fire protection facilities, and park and recreation facilities, are often provided by special purpose districts—but these special purpose districts are not subject to most GMA requirements.[40] GMA jurisdictions are, however, required to include in their CFEs and TEs a complete inventory of existing public facilities within their jurisdictions, including those owned by special purpose districts, and to forecast the future needs for those facilities based on the land use element in their plans. RCW 36.70A.070(3), (6). These requirements apply to all public facilities whether or not they are owned or operated by the respective GMA jurisdiction. GMA jurisdictions are not, however, required to plan, program, or budget for improvements they do not own but are necessary to support growth.[41] *Thus, the provision of water, sewer, schools, parks, fire protection, and some types of transportation facilities to meet the needs of growth to be accommodated in a GMA jurisdiction may remain outside the responsibility or control of the GMA jurisdiction and remain dependent on the planning and budgeting decisions of the relevant public agency.*[42]

And while GMA jurisdictions will not be out of compliance with the GMA if public facilities owned by special purpose districts fail to be provided in an adequate and timely manner, development proposals to accommodate planned growth may still be affected. If a development project will place demands on public facilities that would degrade the level of service below minimum standards—even those owned by special purpose districts that are thus outside the control of the GMA jurisdiction—then GMA jurisdictions are required to

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[40] Transportation facilities that are under the jurisdiction of the Washington State Department of Transportation are also not subject to most GMA requirements applicable to local governments.

[41] *WSDF I* at 31-32; *Sky Valley* at 50. RCW 36.70A.070(3)(c) does not require a county government, as the regional planning entity within the county, to conduct capital planning for all public facilities regardless of ownership. *Id. See also McVittie VI* at 14 n.18, *McVittie VIII* at 11-12, and *Wenatchee Valley Mall Partnership* at 17.

[42] Each of those public agencies is required to plan and provide its public facilities under specific statutory authorization. For example, water and sewer districts are required to adopt comprehensive plans for extension of their facilities that are not inconsistent with the applicable GMA comprehensive plans. RCW 57.16.010(6). The GMA, however, does not govern the budgeting and construction decisions of these districts. Therefore, the GMA requirements of adequate and timely public facilities necessary for growth and the GMA actions forced by failure to actually provide the facilities do not apply to these special districts. Some GMA jurisdictions have entered into interlocal agreements with special purpose districts to more closely coordinate planning and budgeting of public facilities to accommodate growth under the GMA.

take action to avoid degradation through funding, reducing the level-of-service standard, reassessing the land use element, or (for transportation) denying the proposal. Any GMA inconsistencies caused by these actions could cause noncompliance.

F. Modification of Standards and Assumptions

If a GMA jurisdiction determines that all public facilities necessary to support growth cannot be adequately and timely funded, the jurisdiction retains discretion to modify the applicable level-of-service standards or the assumptions and methods that were used to determine facility requirements.[43] In either case, manipulation of technical planning inputs can potentially eliminate all or a portion of the additional public facilities previously identified in the CFE or TE as required to support planned growth and thus maintain compliance with the GMA.[44]

Courts and the GMHBs have allowed GMA jurisdictions to lower transportation level-of-service standards and to alter a previously adopted methodology to establish or monitor those standards even if the effect is to allow a degradation of traffic conditions by new development.[45] There has been no indication that the same actions would not be allowed for other important public facilities. Such modifications may permit more development to occur in a jurisdiction without provision of new public facilities. However, there may be significant practical and political limits as to whether and how much a jurisdiction can lower the minimum standards or change its measurement methodologies. Even if implemented, such modifications may only be one-shot fixes that permit only limited additional development.

Technical assumptions, such as levels of water conservation, children per household, and average vehicle occupancy, also play an important role in determining public facilities

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[43] When a probable funding shortfall is determined, the comprehensive plan land use assumptions must be reassessed to ensure that GMA Goal 12 will be met (i.e., that facilities will be adequate for development without decreasing current service levels below established minimum standards). RCW 36.70A.070(3)(e), .070(6)(a)(iv)(C), .020(12). "Land use assumptions" in a comprehensive plan include level-of-service standards, the methodology to establish and monitor standards, and the technical assumptions used to forecast public facility requirements, as well as the resulting land areas designated in the plan to accommodate allocated growth. *McVittie I* at 19.

[44] Modification of level-of-service standards or public facility requirements that are contained in GMA comprehensive plan must follow applicable plan amendment procedures and must culminate in a public action that is subject to the GMA public participation requirements found in RCW 36.70A.140, .130(2), and .035. *McVittie I* at 19.

[45] The GMHBs have not established any GMA floor to level-of-service standards. The Western GMHB approved the concept of a "fundable capital facilities plan" in which a jurisdiction could identify any or all of (1) public facility needs, (2) revenue available over 20 years, and (3) level-of-service. In other words, the level of service standard could be the residual after setting needs and revenues. *Achen v. Clark County*, WWGMHB No. 95-2-0067, Compliance Order at 1-2 (Nov. 16, 2000).

requirements that are necessary to support the growth each GMA jurisdiction must accommodate. GMA jurisdictions are granted considerable discretion in determining assumptions and methods for accommodating their allocated growth and providing facilities for that growth.[46] If those assumptions turn out to be overly optimistic, then actual public facility requirements could be greater than planned for, and thus underfunded.[47] A public facility funding shortfall may trigger a land use reassessment, including a reduction in growth to be accommodated, or, under transportation concurrency requirements, a development project denial or private funding requirement.

G. Summary

GMA jurisdictions may comply with the GMA's public facilities requirements by (1) identifying, in a CFE and TE, public facility improvements that will adequately support the development to be accommodated, and (2) including and funding these improvements in their annual CIPs and TIPs. However, despite these actions of compliance with the GMA, these public facility improvements may not actually be constructed in time to support development (or even in the foreseeable future) despite the apparent GMA requirement for actual provision of the improvements.

- "Probable funding" in a CIP or TIP may not materialize because of tight budgets or local voter resistance, forcing a GMA jurisdiction to reassess its land use assumptions or reduce its level-of-service standards;
- Programmed improvements may be deferred to a later stage within the 20-year life of a comprehensive plan, at the discretion of each GMA jurisdiction;
- Existing deficiencies in public facilities and funding arrearages may crowd out funding for public facility improvements identified to support future growth;
- Planned improvements to public facilities not owned or operated by a GMA jurisdiction may not be funded or constructed by the responsible agency;

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[46] *Hapsmith v. City of Auburn*, CPSGMHB No. 95-3-0075c, Final Decision and Order at 21 (May 10, 1996). Assumptions and methods must be supported by objective data and credible assumptions that, because they are subject to review by the GMHBs, must be documented and probably must be well-established in practice. In *Hapsmith*, the GMHB objected to one assumption for transportation facility forecasting because that assumption differed from the parallel assumption for capital facility requirements. *Id.* at 22. Thus, consistency with "best practice" assumptions and methods may be less important than the internal consistency required under the GMA. Moreover, even consistency with "best practice" does not guarantee the accuracy of the resulting assumptions and forecasts.

[47] For example, many comprehensive plans in the Central Puget Sound region assume the full implementation of a regional light rail system within 20 years. Such a system is assumed to attract and transport far more work trips than the existing bus system, thereby reducing demands on roads and requiring lower road facility construction to support forecasted growth. Similarly, vehicle occupancy assumptions, based on carpooling and transit ridership, reduce future automobile trips and facility requirements to support growth.

- Technical assumptions underlying forecasts of public facility requirements may be inaccurate, thereby either requiring more public facilities to support growth, (without sufficient funding) or having actual growth underserved by insufficient public facilities, thereby risking level-of-service degradation.

In response to a failure to provide necessary public facilities, GMA jurisdictions are granted broad discretion and flexibility to defer programmed projects, reduce level-of-service standards, alter technical methods and assumptions, and revise land use designations. In most cases, these responses will comply with the GMA even though the accommodation of growth within a jurisdiction may be hampered.[48] However, it is possible that failure could also lead to noncompliance with the GMA. If funding shortfalls continue unabated, if comprehensive plan amendments to reduce standards cannot be adopted, or if UGA land use revisions ripple through other jurisdictions in the county because of GMA consistency requirements for plans and countywide policies, then a jurisdiction could be found noncompliant and subject to corrective orders.

For development projects, the consequences of failure to provide adequate and timely public facilities may be much worse. If a development project will place demands on public facilities that would degrade the level of service below minimum standards, then action by the GMA jurisdiction is forced. Actions may include reduction of standards, alteration of methods, or redesignation of land uses such that the proposed project would not degrade existing levels of service. In these cases, the consequences for the development project amount to delay and costs for the comprehensive plan amendment process, or, if land use revisions cause noncompliance for the jurisdiction, then significant further delay. However, in a worst case, where remedial actions are insufficient or applicable concurrency requirements still bar the development, then the proposed project could face outright denial or substantial additional costs to privately provide the necessary public facilities.[49]

The clear intent of the GMA is that necessary public facilities are provided in an adequate and timely manner to accommodate growth within urban growth areas. Because the adequate funding and timely implementation of necessary public facilities appears increasingly unlikely, a breakdown in the provision of the facilities is a very realistic scenario during this decade. Such a breakdown would probably produce consequences that would discourage and even preclude infill and instead encourage sprawl—entirely contrary to the goals and objectives of the GMA.

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[48] To the extent that failed public facility improvements were funded with GMA impact fees or transportation impact fees, those fees must be expended within six years on designated projects or be refunded to the paying entity. Time limits may also exist for some types of grant funds. Thus, facility funding may be lost by deferral or other discretionary actions.

[49] The specific forced action would depend on whether the degraded public facilities were transportation or nontransportation and on what local ordinances applied (e.g., concurrency ordinances).

IV. STRATEGIES TO AVERT A GMA PUBLIC FACILITIES CRISIS

A. Provide Additional Funding

Options are available to promote the provision and utilization of public facilities necessary to support growth and avoid a collision of GMA goals. The most obvious action is to direct more financial resources to urban infrastructure. Because most GMA jurisdictions have planned and apparently intend to provide the public facilities required under the GMA, any failure to actually provide necessary public facilities will likely stem from funding shortfalls, despite numerous tax and fee resources designated for GMA facilities. These resources include, but are not limited to, the GMA impact fee and transportation impact fee statutes,[50] certain local option components of the real estate excise tax,[51] and facility funding programs administered by the Transportation Improvement Board.[52] These resources augment funds available to GMA jurisdictions through their general tax bases, special assessment improvement districts, and bonding authority.

The problem is, of course, that the sum of these resources is insufficient to fund the public facilities necessary to support growth, along with any funding of arrearages in public facilities.[53] These resources may become even less sufficient in an environment of tight public budgets and voter resistance to tax increases, levies, and bond authorizations. Thus, increases in funds available for public facilities may require new statutory authorization.

The 2002 Washington State Legislature authorized two large packages of transportation facility improvements—one statewide, the other in the central Puget Sound region—both to be funded by increases in the gasoline tax and other motor vehicle taxes, and both subject to approval by the voters. Together, the statewide and regional programs included funding for numerous transportation facilities that are identified in GMA

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[50] RCW 82.02.020 through RCW 82.02.100 and Chapter 39.92 RCW, respectively.

[51] RCW 82.46.010(2) and .035. Each of these sections authorizes counties and cities to adopt a tax of up to 0.25 percent on qualified real estate transfers with the tax receipts dedicated to identified capital facilities. GMA jurisdictions must dedicate tax receipts to projects identified in their comprehensive plan capital facilities elements.

[52] The Transportation Improvement Board ("TIB") is established under RCW 46.26.121 and functions to administer local transportation facility funding grant programs authorized by statute and funded by fuel taxes. TIB grants are typically matched with local funds and private funds or in-kind contributions.

[53] The sufficiency of resources varies significantly by geographic region within Washington State. Resources available to fund GMA public facilities are particularly stretched thin in the high-growth areas of western Washington.

comprehensive plans as necessary to support growth. But after the rejection of the statewide program (Referendum 51) by the voters in November 2002, the prospects for any substantial funding from the gasoline tax for GMA transportation facilities are not promising. Therefore, other funding resources must be authorized if GMA jurisdictions are to comply with their obligations to provide necessary public facilities.

1. Bonding Authority

The total of each county or city indebtedness is limited by statute to (a) 1½% of the total assessed value of property within each jurisdiction not subject to a public vote on the debt (i.e., council bonds) and (b) 2½% of the total assessed property value for debt subject to a public vote.[54] RCW 39.36.020(2). This indebtedness is restricted only to county or city purposes.

Additional local bonding authority could be provided to GMA jurisdictions to fund public facilities necessary to support growth and that have been included in a current CIP or TIP. However, such authority would probably include a requirement for a public vote on the bonds. Success of such public votes would hardly be assured because of voter resistance to increased taxes, even for needed facilities, and because voters are existing residents potentially hostile to providing facilities for growth. Thus, additional statutory bonding authority for GMA jurisdictions may not actually result in more funding for GMA public facilities.

2. Sales Tax

There have been proposals in the recent past to fund public facilities through a local option to dedicate a portion of the retail sales and use tax generated by construction activity in a jurisdiction to locally funded public facilities. In effect, qualifying sales tax receipts would be redirected from a state general fund to a public facility account on which the participating jurisdiction could draw. Essentially the same mechanism was enacted by the 2002 Washington State Legislature as part of the funding for a transportation facilities program that was submitted to the voters in November 2002 as Referendum 51.[55] Under that contingent statute, all of the sales tax generated on construction projects within the state TIP would be transferred to a multimodal transportation account by the Department of Revenue once a year. The Washington State Legislature has also authorized the transfer of a portion of the sales tax proceeds from the state share (1) rural counties for construction of public facilities to

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[54] Additional capacity without a public vote is available for counties assuming the functions and obligations of a metropolitan municipal corporation under Chapter 36.56 RCW (i.e., King County). RCW 39.36.020(2)(b). Additional capacity with a public vote is available to cities owning water, sewer, or electric utilities and to cities "for acquiring or developing open space, park facilities, and capital facilities associated with economic development." RCW 39.36.020(4).

[55] Laws of 2002, ch. 202, §405.

encourage economic development[56] and (2) to public facilities districts for the defined purpose of constructing regional centers.[57] RCW 82.14.370, .390.

Thus, there are statutory precedents for a redirection of portions of the sales and use tax to designated facilities. In addition, there is a demonstrable fairness in dedicating the proceeds from sales taxes generated by certain activities to construct public facilities that serve those activities. However, there may be resistance from the Washington State Legislature to enacting a statute that decreases revenues to the state at a time when budgets must be reduced to meet existing revenues. The perception of such a proposal may be that if Washington had sufficient revenues, then the state would fund public facility grant programs for GMA jurisdictions. As a result, a proposal to redirect a portion of sales tax revenues to fund GMA public facilities may not find the support necessary for adoption at this time.

3. Real Estate Excise Tax

Current statutory authority allows most GMA jurisdictions to impose a tax of up to 0.50% on qualified real estate transfers, with the tax receipts dedicated to identified public facility projects. RCW 82.46.010(2), .035. Many GMA jurisdictions already impose the maximum of this optional tax for a typical total real estate excise tax of 1.78%.[58] Because of rapidly rising real estate prices in western Washington, revenues from the real estate excise tax have increased significantly in recent years. Legislative authorization of an additional local option increment of this tax could add substantial new revenues to the funding of GMA public facilities.

While there is statutory precedent and a clear relationship between development activity, the real estate excise tax, and the application of tax proceeds to public facilities, there are persuasive arguments against further increases in this tax. First, there are fairness

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[56] Up to 0.08 percent sales tax may be imposed by rural counties for financing public facilities. Rural counties are defined as those with a population density of less than 100 persons per square mile or those with areas of less than 225 square miles. The tax would be deducted from the sales tax otherwise paid to the state, and thus was not an additional sales tax. RCW 82.14.370(5).

[57] Up to 0.033% sales tax could be imposed by public facilities districts for projects commencing before January 1, 2004. Use of tax proceeds was restricted to certain statutory purposes and was required to be matched by other public and/or private sources in an amount equal to 33% of the tax proceeds. The tax would be deducted from the sales tax otherwise paid to the state, and thus was not an additional sales tax. RCW 82.14.390.

[58] According to the Department of Revenue, as of the date of this paper 24 counties and 153 cities impose the 0.25% tax authorized by RCW 82.46.010(2), and 9 counties and 108 cities impose the 0.25% tax authorized by RCW 82.46.035 (which is available only to GMA jurisdictions). The Washington State real estate excise tax authorized by RCW 82.45.060 is 1.28%, with the proceeds dedicated to support common schools. Only one county and two cities have adopted either of the other available local options for the real estate excise tax.

concerns because the tax is imposed only on those who sell their property and not on those who do not sell. Second, sellers may be those who leave the jurisdiction, while buyers are a portion of the growth for which additional public facilities may be required (although increased taxes on the seller may be passed along to the buyer).[59] Third, tax proceeds that are dedicated to funding public facilities may substitute for other local tax capacity and not result in a net increase in funds available for public facilities. Thus, while the real estate excise tax may be a prospect for legislative authorization, the actual effect on public facility funding may be less than expected, and certain issues of fairness may be a political liability.

4. Summary

With the rejection of Referendum 51, it is unlikely that any substantial funding of GMA transportation facilities will be provided from gasoline tax or other transportation tax increases in the foreseeable future. As a result, the authorization of other new funding resources for GMA public facilities becomes even more important. The bonding, sales tax, and real estate excise tax proposals could be significant steps in such funding.[60]

However, each method often contains flaws and often faces substantial opposition. Authorization of additional bonding authority dedicated to GMA public facilities will still likely require voter approval to issue bonds. Diversion of construction sales taxes to a public facilities account will likely result in lower state revenues—a zero sum game that may not be approved in a time of state budget deficit. Imposing an additional real estate excise tax for GMA public facilities further burdens sellers of property unless expressly imposed on buyers of property. In addition, none of the proposals may result in the intended increases in funding for public facilities because the new dedicated revenues may be substituted for general funds that would otherwise have been budgeted to the same facilities.

Nevertheless, the needs are so great that all available options for additional public facility funding should be considered.

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[59] The real estate excise taxes that are currently available for funding GMA public facilities are paid by the sellers of affected property. However, the one percent local option real estate excise tax authorized to counties in 1990 (for acquisition of conservation areas, currently implemented only in San Juan County) imposes the tax on property purchasers, instead of sellers. RCW 82.46.070.

[60] Tax increment financing ("TIF") is an economic development tool under which future property tax or sales tax increases within a defined development area are dedicated to the financing of public facilities that are provided to enable the development activity. Washington courts have historically prohibited most TIF on constitutional grounds. *Leonard v. City of Spokane*, 127 Wn.2d 194, 897 P.2d 358 (1995). However, in 2002, the Legislature authorized a limited use of TIF by large cities using only the local portion of the sales tax. Laws of 2002, ch.12, 79, 218. TIF may have some potential for financing of GMA public facilities even though it is intended for defined commercial redevelopment areas and includes several specific statutory requirements.

B. Specify Required Timing for Public Facilities

While the GMA clearly requires that public facilities necessary to support a jurisdiction's allocated growth must be provided, the GMA does not mandate a particular schedule for the provision of facilities. The statute requires only that GMA jurisdictions make capital budget decisions, including TIP projects, in conformity with the CFEs and TEs in their comprehensive plans. RCW 36.70A.120, .070(6)(a)(iv)(B). Beyond that requirement, the GMA encourages that land use plans should locate growth first in areas that already have adequate public facilities and services, second in areas that will be served adequately by a combination of both existing and additional public facilities, and third in the remaining portions of UGAs. RCW 36.70A.110(3). The GMHBs have held that GMA jurisdictions retain broad discretion as to when within the 20-year term of their comprehensive plans to fund the public facilities that they have identified as necessary to support growth.[61] Yet, at the same time, development projects face concurrency or other review for available facility capacity in order to be permitted, presumably pending the uncertain future time when funding for those facilities may be available.

1. Existing Regulation—Annexation

For those portions of UGAs that are unincorporated, the annexation process may provide some timing restrictions based on public facility availability. The GMA contemplates that all designated UGAs will ultimately be annexed into cities, but no city may annex territory that is located outside of its UGAs. RCW 35.13.005; 35A.14.005. In counties with boundary review boards created under Chapter 36.93 RCW,[62] any city proposing to annex areas outside its boundaries must notify the applicable board. RCW 36.93.090. That boundary review board may review the proposed annexation and must review it if certain statutory requests are filed.[63] RCW 36.93.100. A boundary review board may disapprove or modify a proposed annexation only if it concludes that the annexation is inconsistent with one or more statutory objectives, one of which is the creation or preservation of logical service areas. RCW

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[61] *See McVittie IV* at 11, 16. The Central GMHB did emphasize that all public facility projects identified in a CFE and TE must be funded at some point during the original 20-year life of the comprehensive plan. If that cannot be accomplished, then the jurisdiction will be noncompliant with the GMA. However, if funding is unavailable, penalties for noncompliance will not make funding appear.

[62] Boundary review boards must be established in counties with a population greater than 200,000 and may be established by legislative action or petition in other counties. RCW 36.93.030. Thus, there are review boards in large counties and in several smaller counties with a dominant city (e.g., Whatcom, Chelan, Franklin).

[63] A boundary review board must review a proposed annexation if (1) a majority of its members request review, (2) an eligible government unit affected by the proposal requests review, (3) five percent of the voters or property owners within the proposed annexation area petition for review, or (4) if a majority of the board concurs with a petition for review from at least five percent of the voters in the vicinity of the annexation. RCW 36.93.100.

36.93.150, .180. The boundary review board must also consider certain factors involving an annexation proposal, including the needs for and provision of municipal services, along with the probable growth in the proposal area and adjacent areas within ten years. RCW 36.93.170. Thus, if a boundary review board determines that urban public services cannot or will not be provided in a proposed annexation area within a reasonable time, the board may disapprove or modify the annexation.

Reliance on annexation and boundary review boards to regulate the timing of public facilities, however, is unlikely to resolve the problem. Annexation proposals are rarely the determining event for public facility needs, and GMA counties are authorized to disband their boundary review boards because required GMA policies and plans supersede their review and mostly obviate their necessity.[64] RCW 36.93.230.

2. Proposed GMA Timing Regulation

Instead, the dilemma of GMA public facility funding shortfalls, local government discretion to defer funding, and development proposal concurrency tests must be resolved through more direct action. First, courts and GMHBs must clearly require GMA jurisdictions to provide the public facilities necessary to support growth during the 20-year comprehensive plan horizon even after plan reviews and updates extend the 20-year period. If current 20-year public facility obligations are deferred while growth occurs and an updated plan is adopted, the previous obligations should not become improvement projects in arrears that are not enforced under the GMA. In other words, if a 1995 comprehensive plan is updated and readopted in 2002, and some public facilities to support growth in the period 1995-2002 were not fully funded or constructed (i.e., deferred), those public facilities should be allowed to be designated as "deficiencies" in 2002 but should still be funded and constructed by 2015. Thus, all current plan public facility obligations should be required to be completed at least within the original 20-year plan period.

Second, because funding for public facilities necessary to support growth is likely to increasingly fall short of requirements, the Washington State Legislature should provide greater flexibility for development proposals in urban areas while at the same time holding firm the requirements that public facilities be in place to serve development. Enabling a public-private partnership may help alleviate some funding shortfalls. When public facilities cannot be adequately and timely provided to meet development requirements, the developer could be authorized to advance the funds for public facilities, above and beyond reasonable impact fees, to satisfy a concurrency test. This private funding could be supported by binding commitments from the responsible GMA jurisdiction to repay the developer-advanced funding

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[64] Countywide planning policies ("CPPs") under the GMA may (and do) address the same issues as those reviewed by boundary review boards for proposed annexations. CPPs may designate UGAs to be annexed by particular cities and may provide timing criteria for annexation, including provision of public facilities. CPPs and implementing ordinances are reviewable and enforceable by the GMHBs.

within the 20-year plan life.[65] Such commitments would be stronger than traditional latecomer agreements because the GMA jurisdiction would guarantee repayment of all funding beyond any applicable impact fees, regardless of fees received from subsequent developments. This partnership would allow public facilities to be provided as required, with initial funding by the developer but ultimate financial responsibility remaining with the GMA jurisdiction.

Alternatively, the Washington State Legislature could require some timing or phasing of facilities as a component of CFEs and TEs in comprehensive plans, which would then be reflected in CIPs and TIPs. While such an amendment would align more closely the GMA public facility provision and concurrency/action-forcing requirements, it would not alleviate or even address the underlying problem of funding public facilities for growth. GMA jurisdictions would still have discretion to defer provision of facilities that cannot be currently funded in their CIPs or TIPs.

C. Distinguish Facility Needs to Support Future Growth From Existing Deficiencies

Public facilities are deficient if they are currently functioning at a level of service below established minimum standards. Such facilities are in arrears if no facility improvement project is programmed or funded that will remedy the deficiency within six years.[66] GMA provisions focus on public facility needs to support future growth and do not impose a requirement to eliminate or substantially reduce public facility deficiencies or to fund projects in arrears. Yet in reality this distinction is blurred, because CIPs and TIPs often include improvements for both deficiencies and growth and because concurrency tests for proposed development are based on facility capacity, which is affected by both.

Indeed, under the GMA, a jurisdiction must identify in its capital facilities plan "deficiencies in public facilities serving existing development and the means by which existing deficiencies will be eliminated within a reasonable time frame" only if it seeks authority to impose GMA impact fees.[67] RCW 82.02.050(4). If public facility deficiencies have not been

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[65] A possible form for this public-private commitment could be authority for a local jurisdiction to issue bonds for which the payments are made by the developer pending full funding of the programmed public facilities. This bonding could require additional statutory authority.

[66] See *Hensley V* at 17. The GMHB suggested in dictum that if existing transportation deficiencies are not eliminated by funded improvements, then the county might be required to reassess its land use designations. However, the GMHB also indicated that the concurrency system could be relied on to regulate the land use development. *Id.* at 18.

[67] It is unclear at this time to what extent GMA jurisdictions have actually identified existing public facility deficiencies and the means to eliminate them in their comprehensive plans, although it is the general understanding that relatively few jurisdictions have done so. However, GMA impact fees, and the authority to

rectified or funded and are in arrears, that capacity is not available to accommodate growth under the GMA. If concurrency applies, development projects may, as a practical matter, be held responsible for the lack of capacity due to public facility arrearages.

However, the GMA is prospective and should hold development proposals accountable only for its impacts on public facilities functioning at least at minimum standards. The first issue is measurement of facility deficiencies versus growth needs. GMA jurisdictions need a tool to consistently measure the impacts of development on public facilities independent of existing deficiencies and arrearages. The Florida Growth Management Study Commission recommended that the state agency responsible for the growth management program develop a comprehensive impact model that would be used uniformly by local governments in concurrency tests.[68] The model would help identify facility deficiencies and arrearages so that these could be addressed and funded separately from development impacts on public facilities. All GMA jurisdictions should be required to identify deficiencies, whether or not they intend to use GMA impact fees.

Second, assuming that public facility deficiencies can be properly identified and measured, the GMA action-forcing requirements, including concurrency, should explicitly recognize deficiencies. Development projects that are consistent with the comprehensive plan land use element should not be held accountable for existing deficiencies. One approach would be to require the funding of facility deficiencies before any concurrency test may be applied to a proposed development project. A milder approach would be to require GMA jurisdictions to assume the elimination of facility deficiencies in applying a concurrency test (i.e., that all facilities are functioning at least at established minimum standards so that a development proposal is accountable only for its impacts).

Under any proposed modification, additional funding should be made available to GMA jurisdictions for the exclusive purpose of eliminating existing facility deficiencies.

D. Modify the Application of Concurrency

Concurrency ordinances, and their tests for available capacity, are the ultimate enforcement mechanism in the GMA scheme. If properly functioning, concurrency ensures that development will be directed to locations where and when public facility capacity is available. But to function properly, adequate public facilities must be funded in a timely

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impose such fees, have increased in visibility and importance with court decisions such as *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740 (2002).

[68] *A Liveable Florida for Today and Tomorrow*, Final Report of the Florida Growth Management Study Commission, February 2001, at 12. The Washington GMA was largely based on the Florida program, particularly the concurrency requirement. In Florida, concurrency applies to water, sewer, stormwater, solid waste, schools, and transportation, though transportation and schools are the facilities of paramount concern. The proposed impact model would comprehensively and uniformly estimate costs and revenues associated with development proposals at the time of concurrency tests.

manner at designated locations within each UGA. As demonstrated above, however, there is significant likelihood that such public facilities cannot be funded and may be deferred indefinitely. *If necessary public facilities cannot be funded, concurrency ordinances alone will not cause them to be funded or provided.* Instead, concurrency could become a straitjacket for development and ultimately a catalyst for a breakdown in the GMA scheme to accommodate growth within UGAs. Development could be forced to areas where there is existing capacity—outside of UGAs or at the outer edges of UGAs, thereby promoting sprawl—rather than as infill in urban areas.

1. Repeal of Concurrency

One alternative is to repeal concurrency. While the goal of concurrency is laudable, its application may simply be infeasible. If the funding required to provide adequate public facilities, particularly transportation facilities, cannot be obtained by GMA jurisdictions, concurrency tests for new development cannot make the funding happen. The option of private funding (beyond development impact fees) to substitute for unavailable public funding is unlikely to succeed in higher density areas[69] because the magnitude of funding required for transportation improvements in such areas are large and because developer resources are limited. Instead, development projects may migrate to lower density locations either with available capacity or where additional facility capacity is less costly. Development pressures could also increase beyond UGAs into rural areas.

Repeal of the authority for local concurrency ordinances would remove one of the basic elements of Washington's GMA, but concurrency requirements alone will not provide the public facilities necessary for growth and thereby allow GMA goals for urban growth to succeed. Repeal would recognize the emerging reality of inadequate funding and provision of public facilities. Repeal of concurrency would not eliminate or weaken any other GMA requirements for accommodation of growth or provision of public facilities, and other action-forcing requirements would remain intact.

Even so, repeal of concurrency may be premature at this point. Modifications to the statutory concurrency requirements may allow sufficient flexibility for GMA jurisdictions to better accommodate planned growth. Modifications could include exemptions and incentives, geographic specifications, and timing requirements.

2. Exemptions and Incentives

The GMHBs have determined that the GMA allows no exemptions from concurrency requirements, even though local concurrency ordinances currently include numerous

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[69] Many GMA comprehensive plans designate a substantial portion of the jurisdictions' allocated growth to relatively high-density areas of the jurisdictions, such as designated downtowns or "centers".

exemptions.[70] Strictly construed, even the development of one single-family house would require the submittal of data for a concurrency test. GMA jurisdictions have little flexibility to accommodate beneficial development proposals that are consistent with GMA goals and plans if transportation facility capacity is not available or fundable.

To resolve that problem, GMA concurrency requirements could be modified to include *de minimis* exemptions, perhaps consistent with the categorical exemptions provided by statute and rule under the State Environmental Policy Act ("SEPA").[71] As a broader modification, GMA jurisdictions could be allowed a concurrency exemption "account" up to a fixed number of vehicle trips, which the jurisdictions could assign as incentives for development proposals determined to be beneficial to GMA goals and the comprehensive plan.

However, any trips exempted as *de minimis* or in the exempt incentive account should still be included as background trips for purposes of nonexempt concurrency to account for the cumulative impacts of GMA development on the unused capacity of public facilities.

3. Geographic Expansion of Concurrency Tests

Concurrency tests are intended to ensure that capacity is available on transportation facilities that will be affected by a proposed development project. The test is often applied only within the scope of intersections immediately adjacent to a proposed site. The reality is that traffic volumes adjust and spread over a wide road network. Available capacity outside of the immediate vicinity of a proposed project may actually serve to accommodate new trips generated by the proposal. Thus, it becomes apparent that geographically narrow concurrency tests may be inefficient, unfair, and ineffective.

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[70] "The GMA's concurrency requirements represent a challenge to local governments, to be sure, however an important one that must be grappled with rather than 'exempted' away. . . . The Board understands and respects the City's desire to facilitate redevelopment—however, it may not do so by carving out concurrency exemptions for the very kind of 'development' permits that a concurrency ordinance must 'assure' will be denied." *Bennett v. City of Bellevue*, CPSGMHB No. 01-3-0022c, Final Decision and Order (April 8, 2002). The Western GMHB rejected a City of Vancouver "less-than-ten-trip exemption" for requiring a transportation impact study as failing to comply with GMA requirements. The GMHB required the City of Vancouver to assess the impacts on transportation facilities from developments generating less than ten peak-hour trips. *Progress Clark County, Inc. v. City of Vancouver*, WWGMHB No. 99-2-0038c, Final Decision and Order at 6 (May 22, 2000).

[71] Categorical exemptions to SEPA requirements are provided both in the statute, Chapter 43.21C RCW, and in the SEPA rules, Chapter 197-11 WAC. The rules allow for exemption of minor new construction, including (1) residential structures up to four units and (2) office, school, commercial, recreational, service, or storage buildings up to 4,000 square feet of gross floor area (with associated parking facilities for 20 vehicles). WAC 197-11-800(1)(b). A flexible thresholds provision allows cities and counties to raise the exempt levels to a maximum of 20 residential units and 12,000 square feet of nonresidential space, with parking for 40 vehicles. WAC 197-11-800(1)(c).

If the GMA goal is to optimize the use of public facility capacity for the accommodation of growth, then concurrency tests should be applied to as broad a geographic area as is reasonable for the proposed development. The broader the area defined, the more efficient can be the facility capacity utilization for growth. In some cases, the target area should extend beyond jurisdictional boundaries. Some of the broader scale for concurrency may be accomplished through jurisdiction modifications in technical assumptions and methodologies underlying the concurrency tests, still consistent with good professional practice.[72] However, a legislative clarification of concurrency objectives and requirements would be useful to provide authorization and standardization for a broader application of local concurrency tests that will facilitate infill development in UGAs.

4. Adaptive Concurrency Tests

The concurrency requirement could be adapted to certain facility funding realities. In section IV.C above, an adaptation was identified under which the elimination of facility deficiencies would be assumed for purposes of applying a concurrency test—that all facilities are functioning at least at minimum established standards. Extending the same principle, an assumption could be applied to public facilities (particularly transportation facilities) that are designated as necessary to support growth but are not fully funded that some additional capacity is available on those facilities to the extent of the committed funding.

The rationale is that many transportation facility improvements are large and "lumpy", meaning that additional lanes or reconstructed intersections are large and indivisible and are programmed as long-term solutions.[73] However, partial committed funding for those large improvements could be assumed (for purposes of concurrency modeling) to fully fund smaller-scale improvements that would provide some additional capacity for the shorter term. If a development proponent could demonstrate that committed funding could provide such additional capacity, the concurrency test for the development could be applied to that facility capacity. GMA jurisdictions would require additional authority to modify their concurrency ordinances to permit this flexibility,[74] but the burden would be on the developer to provide the

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[72] Concurrency tests are typically based on modeled trip distributions for intersections and corridors in the vicinity of a proposed development. Only if that modeling is iterative or constrained in a manner that will simulate travel decisions will realistic adjustments and spreading of trips be included in data for a concurrency test.

[73] A partial lane or intersection has no benefit as a physical improvement. Therefore, the facility improvement must await the committed funding for a full lane or intersection, even though partial funding for the improvements may be available much earlier.

[74] One possible approach for this assumption of additional capacity would be to include the authority in a legislative provision for flexible concurrency exemptions; in particular, a connection to an exempt incentive "account" available to GMA jurisdictions.

necessary technical documentation. The result would be a loosening of the concurrency straitjacket, but only to the extent of the committed facility funding.

E. Include All Public Facility Providers Under the GMA

Under the GMA, all public facility providers, including independent special purpose districts that provide schools, water, sewer, fire protection, and parks, must adopt plans identifying the applicable facilities that are necessary to support growth within their service areas. Their facility plans must be consistent with the comprehensive plans of the applicable GMA jurisdictions. However, the GMA does not require public facility providers that are not GMA jurisdictions to actually fund and construct their planned facilities. Failure to provide those facilities cannot be enforced by a GMA jurisdiction or appealed to the GMHBs.[75]

The original GMA, as enacted in 1990, included all special purpose districts that provide public facilities or services as defined under the GMA,[76] with the express exemption only of port districts and municipal airports. Laws of 1990 1st Ex. Sess., ch. 17, §18. Special districts were required to adopt capital facilities plans consistent with comprehensive plans and to perform their capital budgeting in conformity with the plans. As a GMA requirement, these duties were enforceable by the GMHBs. However, Governor Gardner vetoed Section 18 because of the exemption for ports and airports.[77] No inclusion of special districts has since been enacted.

The annexation process typically includes a review by the applicable boundary review board of public facility provision and the transfer of assets and services from special districts to the annexing jurisdiction. RCW 36.93.170(2). Full consistency of special districts with GMA jurisdictions would facilitate the annexation and transfer processes and ensure an uninterrupted commitment to provide public facilities necessary for growth. Full GMA consistency would also reduce the role of boundary review boards in the transition process required by an annexation because compliance with GMA public facility requirements for both GMA jurisdictions and special districts could be reviewed and enforced by the GMHBs. In short, all public agencies that provide public facilities should be made subject to the GMA.

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[75] However, GMA jurisdictions may condition permits for future development proposals on nonowned public facilities to be in place or committed to serve the development. *Burrow v. Kitsap County*, CPSGMHB No. 99-3-0018, Final Decision and Order (March 29, 2000), at 17.

[76] Under the GMA, public facilities include "streets, roads, highways, sidewalks, street and road lighting systems, parks and recreational facilities, and schools." RCW 36.70A.030(12). Public services include "fire protection and suppression, law enforcement, public health, education, recreation, environmental protection, and other governmental services." RCW 36.70A.030(13).

[77] Governor's approval and veto message, April 24, 1990. The veto message for Section 18 praised the inclusion of special districts within the GMA as "necessary for successful growth management."

V. CONCLUSION

In its second decade, the GMA and the jurisdictions planning and permitting under its authority are likely to face new challenges produced by conflicting goals and insufficient budgets. These include conflicts between GMA goals for (1) containing growth in denser urban areas while preserving environmentally critical lands and water from impacts of urban development, (2) managing growth within the contained urban areas while promoting affordable housing and economic development, and (3) protecting rural areas without depriving rural residents of economic opportunities. *But no challenge may be greater than accommodating growth within urban growth areas in a tight fiscal climate under which public facilities necessary to support growth will not be adequately and timely provided.*

The entire GMA scheme depends for its success on the adequate and timely provision of public facilities necessary for growth. The preeminent GMA goals of accommodating growth in UGAs and reducing sprawl drive the comprehensive plans and development regulations that guide the growth. Local jurisdiction plans and regulations require budget decisions that will fund and provide public facilities that are necessary to support growth. If public facilities cannot be adequately and timely funded and provided, development proposals may be denied, because of the GMA safeguards of concurrency and other action-forcing requirements. If development proposals are not approved, then allocated growth is unlikely to be accommodated, and the forces of sprawl will again be unleashed, defeating the purposes and goals of the GMA.

A breakdown in the provision of GMA public facilities is not only foreseeable but is beginning to occur. The large requirements of public facilities to support future growth can only be met with new funds from local sources, state grants, and private impact fees. However, tight public budgets and voter resistance to tax proposals are commonplace at both the state and local levels, reducing bond issues, levies, and grant funds. Impact fees are limited by law to an amount reasonably proportional to project impacts. Shortfalls in GMA public facility funding are very likely and are already evident today.

GMA jurisdictions are granted broad discretion to respond to shortfalls in public facility funding. Jurisdictions may defer public facilities to any point within the 20-year period of their comprehensive plan, even if designated as necessary for growth and budgeted with "probable funding" within a CIP or TIP. Jurisdictions may ignore existing deficiencies and project funding backlogs even though such deficiencies may affect available facility capacity for development concurrency tests. GMA jurisdictions do not have control over the provision of necessary public facilities that are owned by special districts, including school, fire, water, sewer, and park districts. In addition, overly optimistic technical assumptions in comprehensive plans may underestimate the levels of public facilities that are necessary to support allocated growth, and thus overestimate the capacity available for growth.

In other words, there are numerous ways a GMA jurisdiction may remain in compliance with the GMA even when necessary public facilities cannot be fully funded and will not be adequately and timely provided. But facility deferrals and deficiencies and the actions that the GMA forces when public facilities cannot be provided do affect the development proposals that will accomplish the GMA goal of channeling growth into urban areas. Transportation concurrency tests can only be met if there is available capacity on transportation facilities. If concurrency does not apply, jurisdictions must lower their level of service standards, which is a one-shot fix to permit additional development, or else reassess their land use plans to make them consistent with the realities of public facility provision. *In short, channeling growth into urban areas is not likely to occur if necessary public facilities cannot be provided in an adequate and timely manner, as required by the GMA.*

If GMA public facilities cannot be provided and development projects are denied, development proponents may resort to litigation. One direction for such litigation may be to invalidate a denial action based on a jurisdiction's unauthorized or unconstitutional failure to provide required public facilities. Litigation could also be directed at establishing the liability of a GMA jurisdiction for damages under RCW 64.40 or 42 U.S.C. § 1983 on the basis of an unlawful action or failure to provide necessary public facilities as required under the GMA.

Such litigation would represent a substantial breakdown in the GMA scheme for accommodating growth. A much more reasonable course of action is to modify the GMA to decrease the likelihood of a breakdown in public facility provision and to increase the utilization of public facility capacity for development to accommodate growth. The most direct approach is to increase the funding capabilities for GMA jurisdictions by raising the available bonding authority for public facilities, redirecting to GMA public facility provision a portion of the state sales tax on construction activity, or adding other taxing authority earmarked for GMA public facility funding. However, revenue sources are stretched for all public activities, and voters and elected officials are reluctant to authorize new taxes and levies. Thus, new funding sources are unlikely to be successful in bridging the public facility funding gap.

Other actions may be more successful in averting or relieving the impending GMA public facility crisis:

- Courts and GMHBs could enforce the GMAs requirements and require GMA jurisdictions to provide the public facilities necessary to support growth during their 20-year comprehensive plan period.
- GMA jurisdictions could be provided with the authority to enter into agreements with private developers to fund necessary public facilities at the time required, subject to a public commitment to repay the advance funding within the 20-year period.
- The GMA could be amended to require some timing or phasing of facilities as a component of CFEs and TEs in comprehensive plans, rather than relying on cumbersome annexation procedures to ensure the existence of public facilities.

- Deficiencies in existing public facilities could be recognized, measured in a uniform manner, and removed from concurrency tests for development that is consistent with GMA comprehensive plans.
- Exemptions to concurrency requirements based on minor impacts or incentives for beneficial GMA development could be authorized.
- Flexibility in the application of concurrency tests could be authorized and even directed, including an appropriate geographical scale to optimize facility utilization and a possible credit for partial committed funding for transportation facility improvements.
- Special districts responsible for the provision of GMA public facilities could be fully brought within the scope and operation of the GMA scheme, as intended in the original GMA legislation.

All of these actions would contribute toward the accomplishment of GMA goals in the context of difficult public budget and voter approval conditions.

In sum, a failure in the provision of GMA public facilities is not only foreseeable, but is beginning to occur. It can, however, be prevented. For a GMA county or city, the risk is noncompliance with the GMA and a possible mandatory revision of its comprehensive plan. For development projects, the risk of the unavailability of adequate and timely public facilities is permit denial or substantial costs of private facility provision. For property owners and voters, the risk of accommodating growth without providing public facility improvements is further degradation of service levels.

Failure to provide the public facilities necessary to support growth could undermine the entire GMA scheme for managing growth. Merely wishing for sufficient public facility funding will not be enough. If a GMA public facilities provision crisis is to be averted, action to provide more capacity and to better utilize existing capacity must be adopted.

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