

A Citizen's Guide to Public Participation

***How to Influence (and appeal) Local Government
Land Use Decisions under Washington State's
Growth Management Act***

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Executive Summary

Under our state's political system, citizens are encouraged to participate in public policy development. This paper is designed to give the interested citizen activist the basic tools to become an effective participant in local government's land use planning and appeal process.

Both the Growth Management Act (GMA) and the Shorelines Management Act (SMA) require local jurisdictions to involve the public when they adopt or amend their Comprehensive Plans (CPs) and Shoreline Master Programs (SMPs). Presented here are several fundamental recommendations to set the strategy and tone for local involvement.

Your public participation begins with identifying the issues that you want to influence. Once you have identified those issues, you will need to find out when your local government is going to consider these issues. After this is done, you can begin to prepare your testimony.

Your public testimony should be presented both orally and in writing. While you should strive to make your oral testimony short and to the point, always supplement your oral testimony with written materials that more fully set forth your argument "for the record".

The "record" is literally a compilation of all testimony, exhibits and deliberations that take place at a hearing. But the real importance of the record is that it contains all of the information that a reviewing body, court or board will have to base its decision on if the decision of the local jurisdiction is appealed. Only evidence that is in the record can be considered on review. That's why we say at the outset that *if it's not in the record, it doesn't exist*.

If your local government has adopted a Comprehensive Plan or Development Regulations that are inconsistent with the county-wide planning policies or otherwise do not meet the criteria of the GMA, you may appeal that decision to the appropriate Growth Management Hearings Board, of which there are three: the Western Washington Board, the Central Puget Sound Board, or the Eastern Board. However, you must have "standing" to file an appeal, i.e., you must have participated in the public hearing process that led to the adoption or amendment of the ordinance in question.

So, get prepared and keep in mind that if your first involvement in the process is simply to show up and testify, you are already too late...

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Providing Effective Public Hearing Testimony

“If it’s not in the record, it doesn’t exist...”

Introduction -

Under our state’s political system we are not only allowed, but encouraged to participate in public policy development.¹ And one of the most contentious areas of public policy involves the regulation of private property. On the one hand are those who support property owners and economic development, and on the other are those that view “restoring” the environment as their priority.

Your local elected officials are caught in this crossfire. They need support for the decisions they make. It is your job as an activist to persuade your elected officials that the course of action you support is the one they should take.

The Growth Management Act (GMA) is a Washington State statute enacted in 1990 to address the problems created by rapid, uncoordinated and unplanned growth experienced in the 1980s. Counties that meet or exceed certain population or growth criteria (and the cities within those counties) are required to meet the planning requirements of the GMA, while counties that do not meet the mandatory criteria may elect to have the GMA apply to their county and cities. Currently, 29 of Washington's 39 counties are required or choose to plan under the GMA.

The land use laws that are passed by our state legislature merely serve as a framework for implementing statewide public policy. Where the real work gets done, the kind that actually affects how property owners can use their property, is at the local government level, where local governments are charged with implementing state legislative policies.

This gives the public, you and me, the opportunity to be influential in shaping the way our land use regulations are adopted and amended. But the choice is up to you. If you choose not to participate in the public process, you have little to complain about when onerous land use regulations are adopted.

¹ In the context of local land use planning, see RCW 36.70A.035 - **Public Participation**; RCW 36.70A.140 - **Comprehensive Plans - Ensuring Public Participation**; and WAC 365-195-600 - **Public Participation**.

The purpose of this paper is to give you, the interested citizen activist, the basic tools to become an effective participant in your local government's land use planning process. Readers will find that the public participation process is much the same regardless of whether the proposed action involves the adoption or amendment of Comprehensive Plans (CPs), Development Regulations (DRs), and Critical Area Ordinances (CAOs) under the Growth Management Act (GMA), or adoption or amendment of Shoreline Master Programs (SMPs) under the Shoreline Management Act (SMA).

Begin your involvement by becoming familiar with your local planning process. Work with planning staff and decision-makers early in the process to help shape the policy that gets presented for discussion.² Put hearing dates on your calendar and get to work. It is never too early to begin preparing. And keep in mind that if your first involvement in the process is simply to show up and testify, you are already too late...

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I. The Local Planning Process

Role of Local Government Planning: Cities, counties and other local governments undertake planning, zoning, and other forms of development regulation according to state enabling statutes. Comprehensive plans, zoning ordinances, subdivision regulations and capital improvement programs are the mainstays of local governments' regulatory programs. Many communities adopt additional measures to manage growth and development.

The planning functions of local governments include policy development, decision-making, and setting legal requirements. Planners use data, statistics, surveys, research, analysis, and indicators providing population, economic, social, and environmental information to prepare community plans. Local government planning activities generally consist of developing comprehensive plans; preparation of individual development project applications; oversight of community development; land use management, coordination and review; policy analysis; research; and public participation.

² See REALTORS® Quality of Life Action Guide

Local governments' fundamental planning role is four-fold:

- 1) Facilitate the development of community goals and policies (based on community character and vision, and physical, economic and social factors)
- 2) Establish development controls and regulations to implement goals and policies
- 3) Coordinate comprehensive plans for the community (land use, economic development, housing, transportation, utilities, recreation, environment, financing and budgets)
- 4) Review individual projects for compatibility with community goals, policies and regulations

Key Players -

Local Planning Staff - Planning staff provide technical expertise and experience to the land use planning process. They typically serve as advisors to the elected officials and the planning commission. Planning staff may undertake land use studies, administer planning regulations and, perhaps most importantly for our purposes, act as a public resource for information on local land use activities.

Planning Commission - Planning commissions are comprised of volunteer citizens and make recommendations to the city council or board of county commissioners concerning proposed amendments to the jurisdiction's comprehensive plan and development regulations. The local planning commission may also review individual applications for such things as variances, permits, site plans, subdivisions, etc.

Hearings Examiner - Local governments may employ a hearings examiner, who is usually a hired professional that takes the place of the planning commission in hearing applications for variances, permits, site plans, subdivisions, etc.

City Councils and County Commissions - These entities are comprised of elected officials that appoint planning commission members, and have final decision-making authority for land use planning.

Getting Involved -

Both the GMA and the SMA require local jurisdictions to involve the public when they adopt or amend their CPs and SMPs. Contact your city or county and request to be placed on their mailing lists for notices concerning land use actions that involve comprehensive planning and development regulations.

Request that an advisory committee be created to oversee Comprehensive Plan and Shoreline Master Program updates. If your city or county has set up an advisory committee, request that you be included. If a limited number of persons may sit on the advisory committee, form an interest group to advance your concerns before your local policy-makers.

Attend meetings and hearings to provide input and make recommendations. Apply for a position on the Planning Commission. Help elect candidates that support your issues (*or consider running for office yourself!*)

Influencing the Process -

Make sure that local elected officials are asking the right questions as they prepare to adopt or amend their CPs, DRs or SMP. Local officials have a duty to see that local community goals are not compromised. They should also be made aware of the costs, in dollars, lost opportunities and negatively impacted property rights, of any proposed amendments.

Your elected officials should address how the community will accommodate growth if land is being removed from existing buildable land inventory due to governmental action or actions by the private sector that have the potential to restrict the use of property. The following are several fundamental recommendations to set the strategy and tone for local involvement.

- Get involved in the amendment process immediately. The goal is to get any proposed amendments to reflect your policy objectives prior to the amendment(s) being brought forward for public debate and decision.
- Another underlying goal is to position yourself as a thoughtful and positive force in getting the local plans updated in ways that avoid public conflict and controversy, as well as advocates assisting in obtaining community support for the plan. You should make it clear that you are getting involved to offer some insights into the community and are committed to ongoing involvement in the update process.

- Develop local examples of projects that accomplish the objectives of the planning elements they want to see included in the plan update. If no examples exist in their own communities, ones from neighboring communities may be appropriate.

Next, identify the people who will be involved in the update process, and how that process will evolve. For example:

- Will a county or city council committee approve the update before it goes to the full council?
- If so, who is the committee chair and who are its members?
- If a three-member county commission is involved, which commissioner, if any, will head up the process and which are most interested in planning issues?
- Will a planning commission be involved?
- Who are the chairs and members?
- Which members of your group have good relationships with specific officials and can talk with them about the plan update?
- Which city or county department will be conducting the update?
- Who is the head of the department and which staff members are doing the work?
- Do you have good relationships with the planning staff and can you talk with them about the update?
- Will there be workshops to discuss the plan?
- When will it first be brought forward for public review and comment?
- Will a planning commission or other similar body do the initial review? If so, what will their process and schedule be?
- When and where will public hearings be held?
- How and when can you and your allies and supporters make comments on the proposed plan?

II. The Audience, the Message & the Speaker

It is helpful to look at the public participation process from a public speaking perspective, focusing on the audience, the message, and finally, the speaker.

The Audience - Your audience is the most important element in this equation. If you do not understand your audience and their role in this process, your ability to influence that audience is likely doomed, and all of your earnest preparation will go for naught.

First, keep in mind that the audience members you will be seeking to educate and influence are public servants. They are there to serve you - specifically to adopt land use regulations within the overall statutory framework that are based on local public participation and are tailored to local conditions and politics. So show them how your proposal meets those goals.

The public forums you will be participating in are not the place to vent your frustrations concerning past policies. It will do you little good to attack your audience for past sins or to accuse them of having a personal agenda (even though they may). You want your audience to see your point of view, and the best way to get them to do that is to present yourself and your information in a professional manner. (If they still refuse to see your point of view, it's time to work the election process to get a different, more receptive audience.)

The Message - The next element in the public participation process that you must focus on is your message. What message are you trying to convey to your audience? First of all, if you have concerns about a specific proposal, you want your audience to know that the proposal they have before them is flawed.³ Then you want to tell them *why*. Remember that you are there because you want your audience to take action that favors your position. If you don't tell your audience how to correct the deficiencies in their proposal, your input is only criticism.

Another important point is that the message you convey must be factually based. If you have done your homework this will not be a problem. But be careful to avoid arguing for acceptance of something that has already been accepted, or attacking an evil that doesn't exist. If you do, you will not only have no case, but you will also be betraying your ignorance in the very area where you are claiming to be informed.

³ Unfortunately we often find ourselves on the defensive, challenging proposals because they do not meet the criteria that the proposed ordinance must meet. However, it never hurts to give someone a pat on the back, and even though you may find fault with much of what is proposed, certainly note the things that you believe have been done properly.

When you are working on the substance of your presentation, and your delivery, keep in mind that it's not only your verbal message that comes across. All speakers convey not just a verbal message, but auxiliary, nonverbal messages and unintended secondary messages. You must be cognizant of these subtleties, lest your actions belie your spoken word.

The Speaker - We now turn to the speaker. While *what* you present is vitally important, *how* you present it may make the difference in whether your message reaches its intended target. You want to establish a rapport with your audience. The easiest way to do this is to maintain eye contact with your audience. Maintaining eye contact tends to show confidence and sincerity, and forces your audience to interact with you. Don't focus on one person. Look directly at each person in turn for a moment or two, and then back again, in effect sweeping your audience with your eyes.

Next, try to relax. For those not used to public speaking, the tendency is to be nervous. But there really is little pressure here. You will rarely receive a hostile reaction. As a matter of protocol you should always thank your audience for the opportunity to participate, but remember that it is your right to be there. But a little practice doesn't hurt either. Don't be shy about practicing your presentation in front of a mirror, or before a friendly (but constructively critical) audience. You may want to get your group together for a trial run, videotaping the process for later review and comment.

III. The Public Hearing

Ok, you've made the decision, the commitment, to become involved in your local government's land use planning. What is your next step?

Your next step is to become aware of when your local government is going to consider issues relating to land use. This can be accomplished in a number of ways, but perhaps the easiest is to ask to be placed on the mailing list for public hearings. Also, you can, and should, become acquainted with the people who will be making front-line decisions, namely those persons that staff your local land use planning department. Let them know that you are very interested in being part of the public process and ask what you can do to stay on top of planning activities.

You can also get an idea of issues that may be coming up by being aware of your local government's statutory planning responsibilities, i.e., know when your local government is supposed to adopt or amend their ordinances.

For example, comprehensive plans must be updated every seven years, but can be amended as often as once a year. Thus you need to find out where your local planners are in the process, and when they anticipate making any significant changes. However you stay informed, the day will soon come when you need to show up and testify.

Your public testimony, (your message), may be presented orally, in writing, or both. While you should make your oral testimony short and to the point, you can, and should, supplement your oral testimony with written materials that more fully set forth your argument. Written testimony will also give you the opportunity to provide technical information to your decision-maker audience that simply does not lend itself well to oral presentation.

Oral Testimony: There is a certain amount of strategy to be employed when you are participating in a public hearing. If you are the first person to testify at a public hearing, your audience will (in most cases) be fresh and attentive. After two or three (or more) hours of testimony they may not be. This “snooze factor” is something you want to avoid. Thus it is generally advisable to show up and sign in early so that you will get an early shot at your audience.⁴

When it is your turn to testify, introduce yourself and, if you represent an organization, the name of the organization you represent. Although not all jurisdictions require you to give your mailing address, you should do so to ensure that you will receive any pertinent future mailings.

Begin your testimony by briefly stating the specific issue or issues that you believe should be addressed. Follow this up with your proposed solution.⁵ As you offer your solution, reference the written materials you have submitted for the record. Re-state your position on the issue and reiterate your support of a specific action. Then conclude by again thanking your audience for the opportunity to be part of the process.

Your oral testimony should be limited to three minutes, five minutes at most. Part of the reason for this brevity is to allow you to deliver your presentation without reading from a prepared text. A short presentation is more easily memorized, or can be delivered using note cards.

⁴ On the other hand, if you are part of a group with the same message, you may want to spread your presenters out, so that they can have not only the first opportunity to set up the audience, but the last opportunity to address weaknesses or inaccuracies in previous speaker's presentations. You should also try not to repeat testimony. If you agree with a previous speaker, say so, and urge the audience to adopt this mutually-supported position.

⁵ You should *always* have a proposed solution. Criticism of current proposals, by itself, is not what this process is about.

Remember too that public officials, like the rest of us, have limited attention spans. This is another reason that “short and to the point” is the preferred approach. On the other hand, written testimony is rarely limited, so you will have the opportunity to present all the information you need. Your oral testimony is as much about how you present it as it is about the content.

In some cases you will be asked questions by your audience.⁶ This can be the most challenging aspect of your presentation, but is often the most fruitful in terms of communication. If you are asked questions for which you do not have a ready (and accurate) answer, be candid and tell them so. But assure them that you will follow up on the question within ____ days. And do it!

Written Testimony: Prior to the hearing, provide your written materials to the clerk of the proceedings. It is a good idea to make enough copies for each of the officials that will be considering the issue, as well as a few extra copies for staff. Once again, professionalism and organization are usually rewarded. You *can* submit your written materials on an unwadded piece of notebook paper using a crayon. Your audience is, within reasonable limits, bound to accept your written offering, regardless of its form. However, a color-tabbed binder with a table of contents not only looks professional, but gives your target audience an easy-to-follow roadmap for your testimony. True, it takes considerably more time, effort and money to present multiple copies of your testimony in this manner, but how much is your testimony worth?

The Record: What is “The Record”? The “record” is literally a compilation of all testimony, exhibits and deliberations that take place at a hearing. The record contains all tape recordings and/or transcripts of oral testimony, written comments, supplementary documents and exhibits. The record also contains the deliberations of the local jurisdiction and any written decision.

How is The Record used? The record, in part, serves as a local archive of testimony and evidence presented at public hearings. But the real importance of the record is that it contains all of the information that a reviewing body, court or board will have to base its decision on if the decision of the local jurisdiction is appealed, as is often the case with land use decisions. The reviewing body will then look at the evidence in the record, consisting of all testimony and exhibits, consider that evidence in light of the local jurisdiction’s ruling, and determine whether the action taken is supported by the law. Only evidence that is in the record can be considered on review. That’s why we say at the outset that *if it’s not in the record, it doesn’t exist*.

⁶ These questions can be a barometer of the effectiveness of your testimony. The type of questions asked will tell you how much of what you were trying to convey came through.

Why is this Important? Let's take an admittedly oversimplified example. Let's say your local jurisdiction is planning to amend their comprehensive plan to designate a fish and wildlife habitat conservation area. The designation will have the effect of requiring 300' buffers on private property.

You have hired a consultant who has put together very good scientific evidence, Best Available Science, which shows that 300' buffers are not supported by BAS. In fact, the evidence suggests that 50' buffers will provide the same habitat protection as 300' buffers. Unfortunately your expert is sick the day of the hearing, his dog ate the hardcopy of his report, and the e-mail copy he tried to send you cannot be opened.

So you are without the technical documentation you need to support your position. Can you testify to the same thing your expert was going to testify to? Perhaps. But even if you are allowed to testify about the science that supports 50' buffers, you will not be recognized as an expert in the field and will likely receive a polite thank you for your time.

So without BAS to the contrary, your jurisdiction proceeds to amend their comprehensive plan to establish a fish and wildlife conservation area that has 300' buffers. The case is appealed to the Growth Management Hearings Board. On appeal, you try to introduce your expert's report showing that 300' buffers are not necessary and that 50' buffers will suffice. Will the board consider your expert's report? *Maybe...*

RCW 36.70A.290(4) does provide an out for those who do not get pertinent evidence into the record below. That statute provides that "The board shall base its decision on the record developed by the city, county or the state and supplemented with additional evidence *if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.*" [Emphasis added]

But this is very risky, because the board has discretion as to what it will allow as supplemental information. The preferred and more certain way to have a reviewing board consider your evidence is to make it part of the original record. If it's not in the record, it doesn't exist...

What Should I Include in the Record? Everything but the kitchen sink, and sometimes you might throw that in as well. Obviously you will want your testimony in the record, both oral and written. If you have surveys or other statistical evidence that are relevant and support your position, they should go in also. Maps? You got maps that support your position? Put 'em in the record too.

The idea is to place every bit of evidence that you have to support your position in the record. Putting “too much” information in the record will rarely be fatal to your position. Failing to get enough relevant, technical information in the record more often than not invites disaster on appeal.

IV. Selected Topic Areas

Once you have the basics of public testimony down, you will next need to focus on the specific areas you will want to provide input on. For example:

Comprehensive Plans - A comprehensive plan, or CP, is a generalized, coordinated land use policy statement for the orderly physical development of a county or city. Comprehensive plans must contain certain mandatory elements, including elements addressing land use, housing, capital facilities, utilities, transportation, economic development, parks and rural areas for counties. Counties and cities required or choosing to plan under the GMA must periodically review and update their comprehensive plans.

The role of a Plan is to state clearly a local vision for its future, and set forth an action plan on how to get there. What areas should be dedicated to development? What areas should preservation efforts be focused on? Where should new housing, industry, commerce and public facilities be located? How should our streets and neighborhoods look? How many parks do we need? How can we achieve a strong local economy while managing growth to realize the kind of communities we want? How can we ensure that we have a sufficient supply of affordable housing for all income levels?

Legislation passed in 2002 extended the timeframes within which local governments planning or choosing to plan under the GMA must review and, if necessary, revise their comprehensive plans.⁷ However, local jurisdictions may, and many do, amend their comprehensive plans every year.⁸

Things to look for -

- Does your local jurisdiction have a method for monitoring how well its CP policies, DRs and other implementation techniques are achieving the comprehensive plan goals and the goals of the GMA?
- Does your local comprehensive plan and accompanying development regulations define a process for amending the plan?

⁷ RCW 36.70A.130

⁸ See W.A.R.'s policy guides for land supply, housing, and economic development for more information, including sample goals and policies.

- Does the Plan contain an adequate economic development element?
- Does the Plan contain an adequate housing element, i.e., one that provides for a variety of affordable housing choices?
- Is the Plan internally consistent?
- Does the Plan show whether projected growth can be achieved within the capacities of available land?
- Does the zoning map show how it will accommodate allocated growth?
- If a county Plan, does it permit land uses that are compatible with the rural character and provide for a variety of rural densities?
- Are the environmental policy goals consistent with the housing goals?
- Does the Plan show how county-wide planning policies have been integrated into the plan?
- Does the Plan use innovative land use management techniques?
- What measures will be taken to provide housing opportunities and economic development?
- What measures will be taken to provide the infrastructure necessary to accommodate future growth?

Critical Area Ordinances (CAOs) - Critical area ordinances are ordinances that address five specific areas - (1) Wetlands; (2) areas with a critical recharging effect on aquifers used for potable water; (3) fish and wildlife habitat conservation areas; (4) frequently flooded areas; and (5) geologically hazardous areas.⁹ These ordinances are intended to protect these specific areas. Yet due to the setbacks and buffers imposed upon these areas, they can restrict property use and reduce the supply of buildable land.

Note that not every critical area must be protected to the same level. The statutory scheme requires only that there is no net loss of environmental functions and values associated with development.

⁹ RCW 36.70A.030(5)

Since the Act's adoption in 1990, the GMA, and the rules promulgated to give the act guidance, have encouraged flexibility and innovation in local land use planning¹⁰, so don't be shy about forcing your local decision-makers to "think outside-the-box." Get them thinking in terms of mitigation, setback averaging, density averaging and transfers, and other creative solutions.

An integral part of developing, or challenging, CAOs involves addressing Best Available Science (BAS). While there have been attempts to define this term, its role in the development of CAOs is the subject of ongoing debate. Part of the reason for this is that the development of BAS applicable to a particular physical setting takes time and money.

To date, much of the empirical work in this area has been carried out by or on behalf of government entities that tend to have their own agenda. Moreover, the bulk of the work that has been done has been conducted in steep-sloped, forestland areas, where the environmental needs are entirely different than those found in a lowland or valley context, or an urban environment that has been substantially built-out.

Therefore, it is your job as an activist to make sure that the BAS your local planners are relying on as justification for a proposed ordinance actually applies to your often unique local physical environment. If we are talking about an urban setting, has the BAS offered in support of a particular designation been tested in an urban, as opposed to rural or sloped area?

Admittedly, this presents a challenge, because unlike some land use issues, the average activist is simply not qualified to address BAS. You are going to need an "expert" that can prepare credible scientific data to be entered into the record. The broader the range of opinions about what constitutes BAS, the more discretion your local government will have in crafting their CAOs.

The downside to this approach is that it costs money. Good science is not cheap. So unless you are independently wealthy, you can't do this alone. To effectively influence your local land use decision-making process you will need to be part of a group force, acting in concert.

¹⁰ RCW 36.70A.090 - **Comprehensive Plans - Innovative Techniques**; WAC 365-195-020 - **Purpose** - "Within the structure established by the act, a wide diversity of local visions of the future can be accommodated. Moreover, *there is no exclusive method* for accomplishing the planning and development regulation requirements of the act." [Emphasis added]; See also, WAC 365-195-030 **Applicability**. "(1) This chapter makes recommendations for meeting the requirements of the act. The recommendations set forth are intended as a listing of possible choices, but compliance with the requirements of the act can be achieved without using all of the suggestions made here or by adopting other approaches."

Part of the reason for this is, again, money, for you will need large amounts of it if you want to win at the BAS game. Another reason is simply the power of numbers, particularly when those numbers consist of registered voters. If your local land use decision-makers know that your group has the power bring legal challenges to any questionable actions as well as the power to influence elections, your comments are likely to have even more influence on the process.

Even though you may not be a scientist, you can still have an impact on the development of CAOs. Keep in mind that the goal is to protect the functions and values of a particular critical area. Your local government is under no obligation to restore or enhance that environment. If it appears that they are headed down that path, call them on it. But also recognize that opposing protection puts you in direct conflict with existing law. So support policies that protect the functions and values of a particular ecosystem while at the same time protecting property owners against unnecessary impacts.

Also, as noted previously, your local government is to take an innovative approach to protecting environmentally sensitive areas. The simple fact is that a one-size-fits-all approach is usually defective. This is perhaps best demonstrated in the area of setbacks.

Often there will be a recommendation that a certain sized setback be maintained along the entire length of a critical area. However, there will rarely be sound scientific support for such a position. Challenge your local government to use a common sense, practical approach to conservation of natural resources that takes into consideration existing political, economic and human conditions.

Rather than asking how large a particular setback should be, the better inquiry is, what are the consequences of using this or that size setback? If a fifty-foot buffer will adequately protect the functions and values of a particular area, set the buffer at fifty feet. If a hundred-foot setback is needed in other areas, fine. Just don't let your local government fall victim to the idea that more is always better. It isn't.

Finally, understand that local governments must show their work, i.e., that they have "included" BAS in their deliberations. If they haven't shown their work, or haven't justified the restrictions they impose, you stand a much better chance of getting an ordinance overturned on appeal¹¹.

¹¹ See CAO/BAS Policy Guides published by W.A.R. and C.T.E.D for more information in this area.

Stormwater Regulations - “Stormwater” refers to all rainfall that runs off the land rather than soaking into it. The ostensible goal of stormwater regulations is to prevent water pollution due to runoff caused by existing and proposed developments. However, stormwater regulation has become a volatile topic for local governments, environmentalists, and those who make a living developing and selling commercial and residential real estate.

Current stormwater issues revolve around the imposition of Phase II regulations adopted by the federal Environmental Protection Agency (EPA).¹² Phase I of the process affected large-scale construction sites (those over five acres) and larger cities.

Phase II regulations will affect small municipal separate storm sewer systems (MS4) in urban areas. Roughly 90 local governments in Washington will be subject to Phase II.¹³ Construction sites disturbing between 1 and 5 acres and discharging stormwater to surface water body or a municipal storm sewer will also be subject to Phase II.

While comprehensive plans and their critical areas ordinances are currently undergoing changes, the actual adoption of the stormwater requirements will not occur until perhaps early 2004. These Phase II requirements will be implemented through general permits that apply to categories of activities.

For example, Ecology will issue a general permit for construction sites disturbing between 1 and 5 acres of ground. Once issued, such sites will submit a notice of intent to be covered under the general permit. At the same time, local governments subject to Phase II will be making any changes to local stormwater ordinances necessary to meet the Phase II standards.

Currently, the details of the general permits for construction sites and how local governments will meet Phase II requirements are being developed with the Department of Ecology. Rather than attempt to suggest a strategy for addressing stormwater amendments, the goal here is to understand where the process is so that interested persons can monitor the situation.

¹² Although they are federal regulations, they are implemented in Washington State by the Department of Ecology.

¹³ At the time of this writing there are ten small cities sitting on the “bubble”, i.e., Ecology has yet to determine whether these cities will be subject to Phase II. The ten bubble cities are Aberdeen, Anacortes, Centralia, Ellensburg, Moses Lake, Oak Harbor, Port Angeles, Pullman, Sunnyside and Walla Walla.

Just as comprehensive plans are tailored to local conditions, so are stormwater regulations. Regulations adopted for the city of Kent are likely to be different from those adopted, in say, Olympia, because they have different needs. Similarly, regulations adopted by a city will be different than those developed for counties. It is not possible to give general advice that would find application in the various setting in which you may find yourself.

When your local government does get around to addressing stormwater issues, as with the development of CAOs, you will need to be able to present expert testimony that addresses the scientific underpinnings of stormwater regulation.¹⁴ Stormwater regulations must incorporate Best Management Practices (BMP), and many of these practices are grounded in BAS.¹⁵

Key Focus Points -

- Ensure that stormwater regulations rely on BMPs rather than numerical water quality limitations. While Ecology's Stormwater Manual serves as one source of BMPs, compliance with the Manual is not a condition for compliance with the general permit or with local stormwater ordinances.
- The general permits should allow flexibility such as the use of other technical stormwater manuals, such as those adopted locally, or BMPs recommended by the EPA.
- Local stormwater ordinances that meet the requirements of the municipal general permit must include flexibility in the selection of BMPs and not require compliance with Ecology's Manual as a condition of the permit.
- See that the Municipal and Construction permits are coordinated to the maximum extent possible to prevent duplication and conflicts.
- Encourage your local government to adopt its own stormwater technical manual, rather than relying on Ecology's. This allows local developers and consultants an opportunity to become familiar with technical standards based on particular local situations.
- Encourage your local government to first meet the requirements of Phase II before focusing on other stormwater issues such as those in the Puget Sound Water Quality Management Plan.
- Finally, ask what impact the proposal will have on site development. The goal is to minimize impact while still complying with the law.

¹⁴ See W.A.R.'s stormwater policy guide for more information.

¹⁵ Consider using W.A.R.'s local issues fund for professional assistance.

Shoreline Master Programs - The Shoreline Management Act¹⁶ requires local governments to adopt shoreline master programs. A master program is a comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and standards developed in accordance with the intent statement found in RCW 90.58.020.¹⁷ The Act is designed to protect, not restore, the functions and values of ecosystems within the shoreline jurisdiction.

The first step for local jurisdictions is to establish and conduct a public participation process. This is the point where citizens may get involved in master program amendments. If your local jurisdiction has a shoreline master program advisory committee, request to be included. If your local jurisdiction does not have an advisory committee, request that one be created. Local governments are to ensure that such an advisory group represents the full range of interests of all citizens within its jurisdiction.

Most of the work required to amend shoreline master programs involves the gathering of scientific data. First, local jurisdictions must identify and assemble the most current, accurate and complete scientific and technical information applicable to shoreline issues of concern. At minimum, they must "make use of and incorporate all available and relevant scientific information, aerial photography, inventory data, technical assistance materials, manuals and services from reliable sources of science". Second, local jurisdictions must base master program provisions on an analysis incorporating the scientific data identified and assembled.

The Department of Ecology is to adopt by rule "guidelines" to assist local governments in developing their shoreline master programs. This has been a contentious process. Previous efforts to adopt guidelines have resulted in Ecology withdrawing their proposal, and the Department's 2000 guidelines were invalidated by the Shoreline Hearings Board.

In accordance with the settlement agreement worked out among the parties to that lawsuit, the Department of Ecology is in the process of adopting new guidelines¹⁸. These new guidelines are expected to be adopted by late 2003. In addition to proposing and adopting the new guidelines, Ecology is also in the process of developing a checklist that local governments will use to guide them in the development of their master programs.

¹⁶ Chapter 90.58 RCW

¹⁷ RCW 90.58.030(3)(b)

¹⁸ For a copy of the 2003 proposed guidelines and other shorelines-related information, see Ecology's Shoreline Guidelines webpage - www.ecy.wa.gov/programs/sea/sma/guidelines/newguid.htm.

So what do these new guidelines mean to you? Well, right now, not much. Two things must happen first before their effect will be felt on the ground. First, the guidelines must go through a formal rulemaking process, where you will have your first shot at having an influence on the rules. Second, local governments must amend their shoreline master programs based on the adopted guidelines. That will be your second opportunity to influence the process. Only when the master programs have been adopted will we know just what these new guidelines mean. And even then, if we have done our job, they will mean different things in different jurisdictions.¹⁹

However, in absence of adopted guidelines and the checklist, the following are excerpts from the Department's old checklist. Please note that this list is ***For Illustration and Discussion Purposes Only***. It is designed to give you an idea of what types of things Ecology looks for when approving SMPs, and the type of questions that should be asked during development of a local SMP. For example:

- Is the public participation process documented?

- Does the SMP contain policies that remain consistent with the SMA and the new guidelines?

- Are the goal (general policy) statements consistent with:
 - (1) The Shoreline Management Act?
 - (2) The New Shoreline Guidelines?
 - (3) The Comprehensive Plan?
 - (4) Countywide planning policies?

- Does the SMP contain SMP regulations that are sufficient in scope and detail to implement the policies, including:
 - (1) General regulations?
 - (2) Specific use regulations?
 - (3) Environment designation regulations?
 - (4) Shoreline modification regulations?

- Does the SMP contain standards and criteria for reviewing conditional use permits and variances?

- Are SMP provisions based on scientific and technical information as defined in WAC 173-26-200(2)(a)?

¹⁹ See W.A.R.'s Shoreline Guidelines policy guide for more information.

- Has an analysis of “ultimate full build-out condition” been conducted that minimizes and mitigates for cumulative adverse impacts?
- Has the local government reviewed the SMP, the comprehensive plan and development regulations for mutual consistency?
- Do the regulations describe allowable uses, water dependency requirements, and environment-specific development standards, such as setbacks, shoreline vegetation conservation requirements, and public access requirements?
- Does the SMP give priority to water-dependent uses?
- Are there standards for the protection and restoration of ecological functions?
- Does the SMP require visual and physical public access where feasible, as described in WAC 173-26-220(4)(d)?
- Does the SMP include standards for setbacks, water, access, sewage disposal, utilities systems, density limits or minimum frontage requirements, vegetation conservation, shoreline stabilization, critical areas protection, and water quality protection?
- Does the SMP require public access for multifamily and multi-lot development?
- Are the SMP wetland and other critical area provisions based on “best available science” and “scientific and technical information”?
- Does the SMP prevent new development and uses, including creation of lots, that will require structural flood hazard reduction measures within the channel migration zone, except for those conditions listed in WAC 173-26-220(3)(c)(i)?
- Does the SMP condition projects on *public* property with the requirement for public access?
- Does the SMP provide standards for the provision of public access for nonwater-dependent uses?
- Do the SMP provisions protect against vegetation removal that could cause adverse soil erosion or result in the need for shoreline stabilization measures?
- Are the vegetation standards based on scientific and technical information?
- Does the SMP ensure that new development within shoreline jurisdiction does not cause significant ecological impacts by altering water quality, quantity, or flow characteristics?

- Does the SMP only allow shoreline stabilization in order to protect an existing or approved use or development or for ecological restoration?
- Does the SMA direct new development to be designed and located to eliminate the need for shoreline stabilization?
- Does the SMP prevent new nonwater-dependent development that requires shoreline stabilization unless other alternatives are not feasible?
- Does the SMP prevent shoreline stabilization that would cause significant ecological impacts?
- Does the SMP prevent the creation of new lots that would require shoreline stabilization in order to develop?
- Does the SMP require that new development on steep slopes be set back sufficiently to ensure that shoreline stabilization will not be needed during the life of the structure (as determined by a geotechnical analysis)?
- Does the SMP allow replacement of an existing shoreline stabilization structure only if there is a demonstrated need to protect a use or development from currents, tidal action, or waves?
- Does the SMP allow new shoreline stabilizing structures waterward of the existing structure only if the residence was occupied prior to January 1, 1992?
- Does the SMP limit the size of shoreline stabilization structures to the minimum necessary and require mitigation of ecological impacts?
- Does the SMP require that piers and docks may be developed for a demonstrated water-dependent use or public access only?
- Does the SMP encourage community dock facilities rather than individual docks?
- Does the SMP contain standards to minimize impacts and size of docks?
- Does the SMP give preference to water-oriented commercial uses?
- Does the SMP include standards (i.e. structure setbacks) to reduce impacts from vegetation removal, surface water run-off, bluff erosion, septic system failure, eelgrass bed damage, bulkheading, and other impacts from residential development, including the creation of residential lots?

V. Growth Management Hearings Boards

I. Overview

There are three Growth Management Hearings Boards - the Western Washington Board, the Central Puget Sound Board, and the Eastern Board. These Boards were created to hear appeals of local governments' adoption of comprehensive plans and related development regulations.²⁰

If your local government has adopted a CP or DRs that are inconsistent with the county-wide planning policies, are internally inconsistent, or otherwise do not meet the criteria of the GMA, such as housing, accommodating growth, etc., you may appeal that decision to the appropriate Board. However, you must have "standing" to file an appeal, i.e., you must have participated in the public hearing process through either oral or written testimony that led to the adoption or amendment of the ordinance in question.²¹

Note that a Board will, with rare exceptions, only consider documents that were submitted to your local government during the public participation phase. Therefore it cannot be overemphasized how important it is to get your comments and documentation into the record.

II. The Appeal Process

Once a decision has been made by your local government, and that decision has been published, you have sixty (60) days to file your appeal with the appropriate Board. Your petition must be filed with the Board, with copies mailed to your county auditor, if you are challenging a county action, or to your mayor if you are challenging a municipal action. WAC 242-02-010 (Appendix "D") sets forth the information that must be contained in your petition. Be very careful when identifying the issues you want the Board to review. Once you get to the hearing, you will only be allowed to address issues specifically raised in your petition.²²

²⁰ The Boards only have jurisdiction to hear appeals concerning the adoption or amendment of Comprehensive Plans or Development Regulations, actions taken under the State Environmental Protection Act (SEPA) or actions taken under the Shoreline Management Act. If you wish to challenge a specific project approval, you must do so under the Land Use Petition Act (LUPA), chapter 36.70C RCW, which has special rules for challenging projects.

²¹ The exception to this general rule is where a local government fails to adopt an ordinance or take other action within the time required by statute. If this occurs, the participatory condition to appeals is not applicable, and the failure to act may be challenged whether or not you participated in any of the local government's public processes.

²² You do have thirty days within which you may amend your petition as a matter of right.

When the deadline for filing petitions is reached, the Board will schedule a pre-hearing conference, the purpose of which is to address procedural issues such as deadlines for filing or responding to motions.²³ When the deadline for filing motions has been reached, you will need to file your opening brief. Your opening brief will identify and argue the issues you want the Board to consider. You will also have the opportunity to file responsive briefs, i.e., briefs that challenge arguments made by other parties to the appeal.

Once the deadline for filing briefs has passed, the Board will conduct a hearing. You have the opportunity to address the Board, and the Board will have the opportunity to ask you questions. Once that process has been completed, the hearing is concluded. A Board then has six months (180 days) within which to issue a decision, called a Final Decision and Order, or FDO.

The Board must base its decision on the record developed by the local jurisdiction, but may supplement the record with additional evidence if the Board determines that such additional evidence would be necessary or of substantial assistance to the Board in reaching its decision.²⁴

Note that local governments' Comprehensive Plans and Development Regulations enjoy a presumption of validity. RCW 36.70A.320(3) provides in pertinent part that "The board shall find compliance [with the requirements of the GMA] unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this [RCW 36.70A] chapter." The decision must be upheld unless the Board finds that the action is "clearly erroneous".²⁵ To find an action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."²⁶

For example, when Mason County sized its Urban Growth Boundary larger than was required to support even the highest OFM population projections, that action was overturned on appeal.²⁷

If, in your judgment, you believe that the Board has made an error in their decision, you may, within ten (10) days of the issuance of the decision, file a motion for reconsideration. No new evidence is permitted to be introduced along with these motions, which, candidly, are usually denied.

²³ Parties may, but are not required to, file various motions with the Board. For example, you may move to dismiss certain issues before the Board based on a lack of standing.

²⁴ RCW 36.70A.290(4)

²⁵ RCW 36.70A.320(3)

²⁶ *Dep't of Ecology v. Pub. Util. Dist. No 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)

²⁷ *Diehl v. Mason County*, 94 Wash. App. 645, 972 P.2d 543 (1999)

Once a Board issues a FDO, you may file an appeal with Superior Court. However, you only have thirty (30) days to file and serve your appeal. And note further that while you may serve all other parties via first class mail, Board members must be personally served.²⁸

If you disagree with the decision rendered in Superior Court, you have the right to file an appeal with the Court of Appeals, or, in some circumstances, directly with the state Supreme Court. Note that the state Supreme Court will be the final forum to address your case, since GMA cases cannot be entertained by the federal judicial system.

CONCLUSION

As we noted at the outset, the purpose of this paper was to introduce citizens to the process of adoption and appeal of local Comprehensive Plans and Development Regulations, with a view toward arming local activists (or would be activists) with the basic information required to be an effective participant in this public process.

We have endeavored to provide enough information to enable the novice political activist to begin to understand the process, without providing so much detail that even experienced activists would find it daunting.

We have also made every effort to convey the concepts and information in this paper in terms that your average citizen can understand. Now it is up to you, the concerned citizen, to take the information in this paper and use it to mold local decision making in a way that serves your local community needs.

²⁸ For this and other reasons, it is strongly advised that you hire a land use attorney to handle your appeal before Superior Court. Local court rules may be strictly enforced, and may constitute a trap for the unwary.