County Leaders Conference

HOT TOPICS IN LAND USE & ENVIRONMENTAL LAW

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COUNTY LEADERS

Hot Topics

- State legislative activity
- Mandatory comprehensive plan update
  - Climate change
  - Critical areas / best available science
  - Capital facilities
  - Essential Public Facilities
- Takings
- SEPA
- Homelessness
- Cannabis
- *Sackett v. EPA*
  - Federal regulatory system
  - Deference

2023 State Legislation

- HB 1110 – Middle Housing
- HB 1181 – GMA and Climate Change
- HB 1337 – Accessory Dwelling Units
- HB 1544 – Shoreline Program Review Schedule
- SB 5374 – Allows Smaller Cities to Adopt County's CAO by Reference
- SB 5290 – Local Permit Review
- HB 1293 – Streaming Development Regulations
- HB 1216 – Clean Energy Siting
- HB 1425 – Municipal Annexations

Mandatory Comp Plan Update

- GMA requires periodic review and update of comprehensive plans
- Some specific review requirements
  - New procedural requirements, including consultation with tribes (HB 1717 (2022))
  - Critical areas regulations, including Best Available Science (RCW 36.70A.130(1)(c))
  - Changes in the law
- Some update requirements apply to non-GMA counties
- Procedural Issues
  - Current schedule set forth in RCW 36.70A.130
  - Requires local legislative action (RCW 36.70A.130(1)(a))

Climate Change

- HB 1181
  - Substantive provisions
    - Adds change and resiliency as a mandatory comprehensive plan element
    - Requires certain counties and cities to take additional action to reduced greenhouse gas emissions and vehicle miles traveled
    - Requires the Department of Commerce to prepare guidance and model provisions
  - Comes with funding
  - Implementation schedule
- Project-level review
  - Greenhouse Gas Assessment for Projects (GAP) Rulemaking
  - Effect of Climate Commitment Act
  - Pending project-level appeals?

Critical Areas & Best Available Science

- What's new?
  - New science
  - New WAC requirements, including no net loss
- Issues
  - The extent to which the requirement parcel specific vs ecosystem wide?
  - How to consider non-regulatory actions?
  - Balancing – environmental protection, agriculture, housing, other factors
- Making a record is critical

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Critical Areas & Best Available Science

- *Confederated Tribes & Bands of the Yakama Nation v. Kittitas County*, No. 22-1-0002 (GMHB), *appeal filed*, No. 396711-III (Wash. Ct. App. Mar. 23, 2023)
  - The GMHB rejected a challenge based primarily on failure to follow WDFW guidelines
  - Pending before the Court of Appeals
- *Munce v. City of Anacortes*, No. 21-2-0002c (GMHB), *appeal filed*, No 570874-II (Wash. Ct. App. June 16, 2022)
  - The GHMB found that Anacortes has adopted undersized stream buffers without reasoned justification
  - Anacortes took action to comply
  - Munce has appealed on various arguments rejected by the GMHB

Capital Facilities

- The GMA requires comprehensive plans to include certain elements, including one involving capital facilities
  - Inventory of existing facilities
  - Forecast future needs
  - Plans for development and funding of new facilities
  - A requirement to stay consistent with the land use element
- *Futurewise v. Spokane Cnty*., 23 Wash. App. 2d 690 (2022)
  - Requirement not limited to city/county-owned facilities
  - Can't simply rely on existing plans; must reanalyze the data
  - Must set level-of-service standards for all facilities
- HB 1181 provides some relief

Essential Public Facilities

- The GMA requires jurisdictions to allow siting of Essential Public Facilities
- Two key requirements
  - Comprehensive Plans must include a process for identifying, and an inventory of, EPFs
  - Local governments must not preclude siting
- Prior litigation focused on the second requirement
- *Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 23 Wash. App.2d 875 (2022)
  - Puyallup significantly restricted siting of Day Centers
  - Court of Appeals held
    - Day Centers not necessarily an EPF
    - Siting was not “precluded”
    - Operator failed to go through city process of identifying EPFs

Stipulated Dismissal of Growth Board Appeals

- The Growth Management Hearings Board had ruled against Spokane County in several appeals and had set compliance schedules
- The appeals were then stayed while the parties negotiated and implemented settlement agreements
- With the first settlement, the Growth Board dismissed the matter based on the stipulation of the parties
- When presented with a subsequent stipulated dismissal, the Growth Board required the parties to go forward with the compliance hearing
- The Court of Appeals held that the GMA did not require a compliance hearing when the parties had settled

Spokane Cnty. v. Growth Management Hearings Board, 534 P.3d 1203 (Wash. Ct. App. 2023)

Stipulated Dismissal of Growth Board Appeals

- Growth Board rules amended effective June 16, 2023
- Change to rule regarding settlement of pending cases

  WAC 242-03-720 Dismissal of action.

  (1) Any action shall be dismissed by the board: (a) Upon petitioner's withdrawal of the petition for review before entry of a final decision and order; or (b) Upon stipulation for dismissal by petitioner(s) and respondent(s) before entry of a final decision and order.
- *Spokane County* decision holds that this amendment does not apply to the pending case
- Lead opinion does not explicitly address the going-forward applicability of the rule

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Takings Jurisprudence

- Takings claims generally fall into three categories:
  - Physical invasion *(Lorretto)*
  - Loss of all economic value *(Lucas)*
  - Exactions requiring nexus and rough proportionality (*Nollan/Dolan*)
  - *Penn Central* balancing
- Some recent U.S. Supreme Court Cases
  - *Murr v. Wisconsin* (2017)
    - Evaluating the relative burden on the property owner generally requires consideration of the claimant's entire site
    - Washington addressed this issue in *Lemire* (2013)
  - *Cedar Point Nursery v. Hassid* (2021)
    - Compelled right-of-entry for labor organizers constitute a per se Taking

Goertz v. City of Kirkland, Wash.

- Key Facts
  - 2016 – Goertz acquires 1.52-acre property, half of which is designated as a wetland
  - 2017 – The city approves 9-lot short plat subject to a condition that Goertz grant a native growth protection easement
  - 2018 – Goetz claims on-site water is from a pipe draining city roads
- U.S. District Court rejects Goertz's Takings claim
  - No physical invasion because the pipe preceded Goertz's ownership
  - No loss of all economic value
  - Exaction satisfied requirement of nexus and rough proportionality
  - Satisfied *Penn Central balancing*
- Appeal filed but then withdrawn

Goertz v. City of Kirkland, Wash., 641 F. Supp. 3d 990 (W.D. Wash. 2022)

SEPA – Background & the Basics

- SEPA
  - Adopted in 1971 as gap filler to supplement to other land use and environmental laws
  - First and foremost, SEPA requires review and disclosure of information
- Three ways counties touch SEPA
  - As a regulator
  - Review of their own capital projects and certain other actions
  - Adoption of some types of plans and regulations
- Threshold questions
  - Lead agency
  - Is there a project action or nonproject action?
  - Is the action exempt from SEPA review?

SEPA – Background & the Basics

- Procedural Steps
  - Completion of checklist
  - Threshold determination – DNS, DS, and MDNS
- Environmental Impact Statements
  - Identifies impacts
  - Alternatives analysis
  - EIS is primarily informational but can support discretionary exercise of substantive authority
- Compare to National Environmental Policy Act (NEPA)
- Special SEPA issues
  - Establishing the lead agency
  - Taking lead adjacency status. *City of Puyallup v. Pierce Cnty.*, 8 Wash. App. 2d 323 (2019)
  - Relying on past SEPA review

Recent SEPA Legislation & Decisions

- Recent Legislation
  - HB 1923 (2019) – exempting certain city housing legislation from GMA & SEPA appeals and exempting some impacts of housing projects from SEPA review
  - SB 5818 (2022) - expanding SEPA exemption for certain housing projects
- *Fischer Studio Bldg. Condo. Owners Ass'n v. City of Seattle*, 25 Wash. App. 2d 593 (2023)
  - SEPA appeal of infill housing project
  - Applied new SEPA exemption to pending development project
- *City of Olympia v. W. Washington Growth Mgmt. Hearings Bd.,* 531 P.3d 816 (Wash. Ct. App. 2023)
  - In 2018 Olympia had enacted “Missing Middle” legislation
  - Court held that HB 1923 applied to pending challenge

Recent SEPA Decisions

- *Escala Owners Ass'n v. City of Seattle*, 22 Wash. App. 2d 1058 (2022) (unpublished)
  - Involves project-level SEPA review
  - Board language about relying on existing environmental documents
- *King Cnty. v. Friends of Sammamish Valley*, 26 Wash. App.2d 906 (2023)
  - Challenge to land use legislation
  - Growth Board required review of project-level impacts and restricted use of existing SEPA documents
  - Court of Appeals reversed Growth Board

Homelessness

United States Constitution - Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

- *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019)
- *Aitken v City of Aberdeen*, 393 F. Supp 3d 1075 (W.D. Wash. 2019)
- *Seattle v. Long*, 198 Wn.2d 136 (2021)
  - Homestead Act
  - Excessive Fines
- *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), *petition for cert. filed* (U.S. Aug. 22, 2023) (No. 23-175)

Cannabis – Social Equity Program

- HB 2870 (2020) – Establishes Social Equity Program for issuance of retail licenses
- Social Equity in Cannabis Task Force Report (December 2022)
- SB 5080 (2023)
  - Authorizes additional cannabis retail licenses
  - Adds cannabis producer and processor licenses to the Social Equity Program
  - Provides flexibility for the initial location of cannabis licenses issued through the Program.
- Additional LCB rulemaking to follow

Cannabis – Local Zoning

- Historically the Liquor Control Board ("LCB") sought, and honored, comments from local government about zoning compliance
- LCB started issuing cannabis licenses for uses inconsistent with local development regulations
- Kittitas County Litigation
  - Kittitas County sought a Declaratory Order under the APA
  - Superior Court found that the LCB was violating the GMA
  - Division III reversed
- HB 5080 § 2 (2023) requires LCB to honor local objection in certain circumstances

Matter of Kittitas Cnty. for a Declaratory Ord., 8 Wash. App. 2d 585, 438 P.3d 1199 (2019)

Federal Regulatory System

- Why does the federal system matter to local government
  - Affects whether, and the speed at which, complex projects move forward
  - Rigor of federal review often affects scope of state/local review
  - In addition to being a component of project review, federal law creates local legislative requirements
- Major Federal Environmental Statutes
  - Clean Water Act
    - Administered by the EPA and Army Corps, and through delegation to states
    - Implemented through NPDES system, 404 permits, and 401 water quality certifications
  - Endangered Species Act
    - Administered by Depts. of Interior (FWS) and Commerce (NOAA Fisheries or NMFS)

Deference – Federal Cases

- Principles behind judicial deference to agency decisions
  - Agency expertise
  - Public process involved in agency rulemaking and adjudications
- *Chevron*
  - Involved EPA rulemaking to implement the 1977 amendments to the Clean Air Act
  - If a statute is ambiguous or silent on a particular issue, courts defer to any reasonable interpretation by the agency charged with implementing the statute
  - Applies to both rulemaking and adjudications
- *Skidmore* deference applies to informal agency actions
- Continuing federal court activity in this area

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)

Skidmore v. Swift & Co., 323 U.S. 134 (1944)

Deference – State Cases

- *Sleasman*
  - City clearing limitations turned on whether a lot was "undeveloped or partially developed"
  - No deference because city interpretation had not been adopted as agency policy

Sleasman v. City of Lacey, 159 Wash. 2d 639, 646 (2007)

Sackett v. EPA

- Clean Water Act
  - The predecessor to the CWA applied to “navigable water”
  - Adopted in 1972, the CWA governs the discharge of pollutants into “waters of the United States”
  - Extensive history of litigation and rulemaking about the scope of WOTUS
- The Sacketts
  - 2004 - the Sacketts purchased a .63-acre vacant lot to build a house
  - 2007 – after obtaining local permits, they began construction
  - 2007 - the EPA issues an “administrative compliance order” based on the presences of wetlands on their property and orders them to stop construction
- 2023 Supreme Court decision
  - Narrow view of WOTUS, particularly regarding wetlands
  - No deference to EPA/ACOE rule

Sackett v. Env't Prot. Agency, 143 S. Ct. 1322 (2023)

Judicial Deference in Washington
Fode v. Department of Ecology

- Ecology issued administrative orders regarding unlawful irrigation
- Fode had 30 days to appeal, but RCW 43.21B.001(2) is ambiguous about when the appeal period starts
- The PCHB dismissed the appeal based on Ecology's longstanding statutory interpretation
- Court of Appeals
  - declined to defer to Ecology based on lack of "special expertise" over limitations periods
  - Court of Appeals adopted more generous interpretation based on public policy of deciding appeals on the merits

Fode v. Dep't of Ecology, 22 Wash. App. 2d 22 (2022)

Judicial Deference in Washington
Kenmore MHP LLC v. City of Kenmore

- Legal Structure
  - GMA requires Growth Board appeals to be filed within 60 days of the Notice of Adoption; the GMA also allows the Growth Board to promulgate procedural rules
  - WAC 242-03-230(2)(a) requires the appeal to be served on "the respondent(s) on or before the date filed with the board"
  - WAC 242-03-230(4) provides that "[t[he board may dismiss a case for failure to substantially comply with this section"
- City of Kenmore adopts zoning ordinance; appellant files with Growth Board, then one business day later serves, an appeal – all within 60 days of the Notice of Adoption
- Growth Board, following prior Board decisions, dismisses the appeal; Court of Appeals affirms

Kenmore MHP LLC v. City of Kenmore, 1 Wash. 3d 513 (2023)

Judicial Deference in Washington
Kenmore MHP LLC v. City of Kenmore

- Two points of deference
  - The legality of the Growth Board's rules and the application of those rules
- The Supreme Court accepted that the rule itself was lawful
- The Supreme Court did not defer to the Growth Board's application of the rule; the court held that there was substantial compliance based on two considerations
  - No prejudice to the city
  - Justifiable excuse
- The court held that the goal is for cases to be heard on the merits

Kenmore MHP LLC v. City of Kenmore, 1 Wash. 3d 513 (2023)

Greensun Group v. City of Bellevue

- Bellevue has adopted a 1000-foot separation requirement for marijuana retailers
- Code was silent about how competing uses would be prioritized; staff interpretation evolved
- Greensun brought a broad challenge to Bellevue's adoption and implementation of the 1,000-foot separation requirement
- The Court of Appeals granted Greensun appeal based on lack of formal rulemaking or legislation
- In a subsequent appeal, the Court of Appeals allowed a tortious interference claim to go to trial

Greensun Group, LLC v. City of Bellevue, 194 Wash. App. 1029 (2016) (unpublished table decision), *review denied*, 187 Wash. 2d 1005 (2017), *appeal after remand*, 7 Wash. App. 2d 754, *review denied*, 193 Wash. 2d 1023 (2019)

Confederated Tribes & Bands of Yakama Nation v. Yakima Cty.

- Yakima County hearing examiner approved a conditional use permit for Granite Northwest to expand a mine
- Yakama Nation appealed to the BOCC
- The BOCC adopted a resolution affirming; staff subsequently mailed the resolution to the parties
- LUPA was arguably ambiguous as to when the 21-day limitations period started
- Washington Supreme Court: appeal period started the date of mailing

> "Even under Granite NW's reading of the filing deadline statutes, Yakama would be only a single day past the 21-day deadline. LUPA provides stringent statutory deadlines, *Asche v. Bloomquist*, 132 Wash. App. 784, 795, 133 P.3d 475 (2006), but these deadlines should not be so woodenly interpreted as to prevent judicial review on the merits."

Confederated Tribes & Bands of Yakama Nation v. Yakima Cty., 195 Wash. 2d 831, 466 P.3d 762 (2020)

City of Tacoma v. Dep't of Ecology

- There is broad agreement that Puget Sound suffers from excessive nutrient pollution
- The relative sources are not well understood but wastewater treatment plants play some role
- The Department of Ecology is attempting to address this issue through a general NDPES permit, which is on appeal to the Pollution Control Hearings Board
- Ecology's action was based on an administrative interpretation of federal clean water requirements.
- In *City of Tacoma* the Court of Appeals held that Ecology's reliance on the administrative interpretation violated the rulemaking requirements of the APA

City of Tacoma v. Dep't of Ecology, 535 P.3d 462 (Wash. Ct. App. 2023)

Arguing Deference

- When arguing deference . . . .
  - Assess equities of the particular case
  - Consider the equities of a clear and consistent system
  - Present counter interests
- How to handle change in interpretation
  - Law is clear, that absent some illegal reason, agencies can change their interpretation of a rule or other authority
  - Document the change in determination
    - Code interpretation under RCW 36.70B.110(11)

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