

County Leaders Conference

HOT TOPICS IN LAND USE & ENVIRONMENTAL LAW

November 21, 2024

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Hot Topics

- Legislation and Rulemaking
- Comprehensive Plan updates
- Takings
- Constitutional Issues re: Homelessness
- SEPA
- Vesting and Nonconforming Uses
- Rulemaking & Deference
- A Few Minutes on a Few Other Topics

Legislation That Passed

- 2023 Legislation
 - GMA and climate change (HB 1181)
 - Middle housing (HB 1110)
 - Accessory dwelling units (HB 1337)
 - Expediting local project review (SB 5290)
- 2024 Legislation
 - Requires co-living to be allowed within the urban growth area (HB 1998)
 - Amendments to middle housing bill (HB 2321)
 - Residential parking requirements (SB 6015)

Other Legislative & Agency Activity

- Bills that didn't pass
 - Emergency and supportive housing (HB 2474)
 - More SEPA exemptions (SB 6061)
 - Transit-oriented development (HB 2160)
- Ongoing Rulemaking
 - Housing and other GMA requirements
 - Climate change / implementing HB 1181
 - LCB rulemaking to implement SB 5080 / Social Equity Licenses
- Initiative 2066 – natural gas
 - ESHB 1589
 - Potential consequences and legal challenges

Other Potential Legislative Issues

- Net ecological gain
- Riparian areas
- Environmental justice
- Planning obligations of service districts
- Clean energy (including preemption)
- Housing
- Parking

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 municipalities
- Procedural Issues
 - Current schedule set forth in RCW 36.70A.130
 - Requires local legislative action (RCW 36.70A.130(1)(a))

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
 - Housing
 - Other factors
- Making a record is critical

Critical Areas & Best Available Science

- *Munce v. City of Anacortes*, 2023 WL 8433772, No 570874-II (Wash. Ct. App. Dec. 5, 2023)
 - The GHMB found that Anacortes has adopted undersized stream buffers without reasoned justification; Anacortes took action to comply
 - GMHB and Court of Appeals denied Munce's appeal
- *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

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
- Pending GMHB litigation

Takings Jurisprudence

- Takings claims generally fall into four categories:
 - Physical invasion (*Lorretto*)
 - Loss of all economic value (*Lucas*)
 - Exactions requiring nexus and rough proportionality (*Nollan/Dolan*)
 - *Penn Central* balancing
- Supreme Court extended *Nollan/Dolan* to purely monetary conditions. *Koontz*, 570 U.S. 595 (2013)
- Similar Washington statutory provision: RCW 82.02.020

Impact Fees

- Does *Nollan/Dolan* extend to legislatively established impact fees?
- Washington cases say no.
 - *City of Olympia v. Drebeck*, 156 Wash. 2d 289 (2006)
 - *City of Fed. Way v. Town & Country Real Est., LLC*, 161 Wash. App. 17 (May 10, 2011)
 - *Douglass Properties II, LLC v. City of Olympia*, 16 Wash. App. 2d 158(2021)
- *Sheetz v. Cnty. of El Dorado, Ca.*, 601 U.S. 267 (2024)

Developing Takings Issues

- *Entel v. Asotin Cnty.*, No. 39563-4-III, 2024 WL 1450426 (Wash. Ct. App. Apr. 4, 2024) (unpublished)
 - Challenge to condition to construct secondary fire access road
- *Rimmer v. City of Edmonds*, No 23-2-05426-31 (Snoh. Co. Superior Ct.)
 - Challenge to a tree-replacement ordinance
- *Rapczak v. City of Kirkland*, No. 85626-0-I, 2024 WL 4367540 (Wash. Ct. App. Sept. 30, 2024)

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)
- *Seattle v. Long*, 198 Wash. 2d 136 (2021)
 - Excessive Fines
 - Homestead Act
- *City of Grants Pass, Or. v. Johnson*, 144 S. Ct. 2202 (2024)

SEPA – Background & the Basics

- SEPA
 - Adopted in 1971 as gap filler to supplement other land use and environmental laws
 - First and foremost, SEPA requires review and disclosure of information
- Three ways municipalities touch SEPA
 - As a regulator
 - Review of their own capital projects
 - 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 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*, 556 P.3d 132 (2024)
 - Challenge to a county land use ordinance
 - Growth Board required review of project-level impacts and restricted use of existing SEPA documents
 - Supreme Court affirmed based on SEPA and GMA issues

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 exemption for certain types of housing projects
- New exemptions applicable to pending projects
 - *Fischer Studio Bldg. Condo. Owners Ass'n v. City of Seattle*, 25 Wash. App. 2d 593 (2023)
 - *City of Olympia v. W. Washington Growth Mgmt. Hearings Bd.*, 27 Wash. App. 2d 77 (2023)

Vesting and Non-Confirming Uses

- Vocabulary
 - Vesting – Establishes when the rules are established that will govern a particular permit decision
 - Finality – Once the government issues a decision, and a very short appeal period passes, the decision is final and the rights it grants generally cannot be disturbed
 - Legal Nonconforming Structures and Uses
- Limitations on legal nonconforming
 - Disfavored
 - Generally subject to new police-power regulations
 - Subject to amortization
- *Shadow Creek Investments, LLC v. City of Anacortes, appeal filed, No. 86285-5 (Wash. Ct. App. Feb. 7, 2024)*

Nonconforming Uses

Icicle/Bunk, LLC v. Chelan County

- Facts
 - Icicle/Bunk LLC owns a parcel that contains a primary residence and an accessory dwelling unit (“ADU”)
 - Since 2006, Icicle rented both as short-term rentals (“STR”)
- County code
 - In 2007, Chelan County adopted code requiring property-owners with an ADU to live in one of the residential units
 - In 2021, Chelan County adopted code limiting STRs to one per parcel
- County denied Icicle’s request to continue operating two STRs
- Court of appeals rejected Icicle’s challenge
 - Icicle retained the ability to operate a STR; the county only regulated the manner of use
 - The court also alluded to the amortization rule

Icicle/Bunk, LLC v. Chelan Cnty., 28 Wash. App. 2d 522 (2023).

Agency Rulemaking

City of Tacoma v. Dep't of Ecology

- For several years, the Department of Ecology (“DOE”) has been studying whether and how to regulate nutrient-discharge levels from wastewater treatment plants
- DOE considered adopting standards by public rule but instead issued an internal directive to DOE staff
- In December 2020, Tacoma and several utility districts bought a declaratory judgment action, contending that this internal directive unlawfully circumvented the APA rulemaking requirements
- In December 2021, DOE issued the Puget Sound Nutrient General Permit applicable to all wastewater treatment plants. Legal challenges to that permit were filed with the PCHB and are stayed pending the declaratory judgment litigation
- In September 2023, the court of appeals held that DOE’s action violated the APA.
- Washington Supreme Court reversed

City of Tacoma v. Dep't of Ecology, 555 P.3d 390 (2024).

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)

Federal Regulatory System

- Why does the federal system matter to local government
 - Affects whether, and the speed at which, complex projects move forward
 - In addition to being a component of project review, federal law creates local legislative requirements
 - Rigor of federal review often affects scope of state/local review
- 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)

Judicial Deference to Agency Actions

- Principles behind judicial deference to agency decisions
 - Agency expertise
 - Public process involved in agency rulemaking and adjudications

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

- No deference to EPA/ACOE rule
 - Narrow view of Clean Water Act, particularly regarding wetlands
- Impacts of narrower judicial review

A Few Minutes on a Few Other Topics

- RLUIPA/Free Exercise/First Amendment
- Sign Codes
- Water Supply
- Cannabis
- Cell Towers
- Damages
- Public Duty Doctrine

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