



To: Honorable Whatcom County Planning Commission and Honorable Whatcom County Council
From: The Building Industry Association of Whatcom County
Date: February 17, 2009
Re: Ten-Year Review Area Environmental Impact Statement Scoping

Introduction

The Building Industry Association of Whatcom County (BIAWC) welcomes the opportunity to comment on the scoping of this Environmental Impact Statement (EIS). We would like to publicly thank the Whatcom County Council and the Whatcom County Planning Commission for encouraging this public hearing. It is refreshing that some members of our Whatcom County (County) government have not forgotten the Washington State Growth Management Act's requirements for "continuous public participation."^{1&2}

In the past, the Planning Commission has expressed concern over "last minute contributions" of testimony, especially written testimony. We apologize for our late submission, but we must point out that all of the pieces for this public hearing were not available on Whatcom County's website until late last Thursday afternoon, February 13, 2009. In addition, this past weekend was the President's Day holiday weekend, and we would venture

¹ According to the Washington State Growth Management Act, "[e]ach county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed." WASH. REV. CODE §36.70A.140 (2009).

² In addition, according to GMA, "[a] comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140." WASH. REV. CODE §36.70A.070 (2009).

to guess that many members of the public were engaged in other activities. These types of activities over a holiday weekend frustrated our County's *last* ten-year review process, and led to the County stipulating to the Growth Board that it did not complete the process correctly.

If the County Planning Department does not choose to post items of importance to the community, how is the community supposed to responsibly have time to read, digest, and comment on the postings? How is the public supposed to make insightful public comment in three minutes when these items are made available to the public at the last minute? We would argue that for meaningful discussion, such staff reports should be posted in an early and timely manner.

II. Environmental Impact Statements

We are not prepared at this time to "advocate" for any particular "scope" of the proposed Environmental Impact Statement (EIS). It would not be responsible for us to comment on a scoping document based on data that even the County agrees is not yet complete and accurate. However, we confess that we are confused by how this EIS process is being proposed.

In the first place, we recognize that Whatcom County is under a June 2009 deadline from the Western Washington Growth Management Hearings Board (WWGMHB), and understand that time is of the essence to complete the ten-year review process, particularly because the County is out of compliance, and has been for some time.

We do appreciate the County staff recognizing the importance of an EIS. However, we want to point out for the record that properly conducted EISs usually take quite a bit of time. The City of Bellingham in 2004 was much more responsible in handling its urban growth areas process in 2004 when it first published a detailed Draft Environmental Impact Statement (DEIS), and then an Environmental Impact Statement (EIS) after that. In truth, the County should have conducted these EIS process years ago, but of course, as we all know, it did not.

In terms of EISs themselves, Washington State's State Environmental Protection Act (SEPA) rules detail specific contents of the EIS alternatives, requiring the alternatives section of the EIS to:

describe the objectives, proponents, and principle features of reasonable alternatives, including the proposed action with any mitigation measures; describe the location of alternatives; identify phases of the proposed; tailor the level of description to the significance of the environmental impacts; devote sufficiently detailed analysis to each alternative so as to permit a comparison of alternatives; and discuss benefits and disadvantages of reserving implementation of the proposal to a future time. The no-action alternative must be included. Tim Butler and Matthew King, *Environmental Law And Practice, Washington Practice Series™ §17.23 Discussion of alternatives*, 24 Wash. Prac., *Environmental Law And Practice §17.23 (2009)* (please see attached).

We are confused, particularly because even though we do not believe this is the intent it appears as if the County is deciding *which* option to plan the EIS to examine, when in fact all alternatives need to be studied, particularly the “no action” alternative. We believe that more explanation to the public needs to be provided on this point.

III. Rural Lands

We want to express dismay that the County is using the fact that its ten-year urban growth area process (which it is out of compliance on) as an excuse to further explore the opportunity to downzone the entire rural County. The County should first strongly examine *why* the current urban growth areas and the future urban growth areas (i.e. the Five-Year Review Areas to the City of Bellingham) are not being built upon.

GMA requires that planning be realistic. As the Western Washington Growth Management Hearings Board states in its July 2, 2008 Order Finding Noncompliance [for Whatcom County], “the ten-year UGA update requires that this review be based on solid data.” (Western Washington Growth Management Hearings Board Order Finding Noncompliance, July 2, 2008 page 8 of 15.)

Using Bellingham’s UGA as a model, it is very difficult to build anything in the existing UGAs, including City limits. Permitting processes alone have become convoluted in recent years, in spite of the lowering of the volume of permits sought. In addition, it is difficult to receive utility extensions, even in City limits. Rather than potentially punishing rural property owners and ignoring their property rights, the County should examine appropriate, realistic

processes with the cities, to ensure that growth occurs in our UGAs, the place where GMA says it is to occur.³

One fiction of GMA that recurs constantly is that there can be absolutely no building or development should be allowed in the unincorporated County for residential purposes. That is in fact not true, and violates GMA's provision of rural character at RCW §36.70A.030 (15) (b):

"Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan: That foster traditional rural lifestyles, rural-based economics, and opportunities to both live and work in rural areas [.] WASH. REV. CODE §36.70A.030 (15) (b) (2009).

We want to remind the Planning Commission and the Council that GMA is supposed to be flexible to provide for a variety of different land uses. The rural development section of GMA states,

[t]he rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve permitted densities and uses. WASH. REV. CODE §36.70A.070 (5) (2009).

In addition, this point is misunderstood often: The Washington Court of Appeals has established that a five-acre lot is "decidedly rural density." *Whidbey Island Environmental Network v. Island County and Western Washington Growth Management Hearings Board*, 122 Wash. App. 156, 169 P. 3d 385 (2004) quoting *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wash. 2d 542, 571, 958 P. 2d (1998).

We also do not want to forget the "continuous public participation" process under GMA, and if this EIS scoping process is enough notice for rural property owners (please see the previous mention of "continuous public participation" above).

³ According to the Washington State Growth Management Act, "[u]rban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources and third in remaining portions of urban growth areas. WASH. REV. CODE §36.70A.110 (3) (2009).

Another legal fiction of GMA that will impact this EIS scoping, as well as any realistic land supply methodology developed for our UGAs, is to view population projections as enrollment admission numbers, such as used in universities, or theme parks. In that popular scenario, once a community sets a number, that number is a goal to be reached, and once it is reached, the doors close, until people leave. That simply is not true. Population projections are used as *predictors* to be used for *planning* numbers. They are numbers that communities use to plan for infrastructure, school enrollment, future state grant funding needed, etc. These numbers are not absolutes, and are not meant to be.

However, GMA does require that counties and cities must provide sufficient capacity of land suitable for development within their jurisdictions and employment growth, as adopted within the applicable countywide planning policies "and *consistent* with the twenty-year population forecast from the office of financial management. WASH. REV. CODE §36.70A. 115 (2009) (bold and italics added for emphasis.)

As stated above, GMA does require that planning be realistic, and we expect requires its EISs to be realistic as well. In that vein, one set of numbers that concerns us is that the Growth Management Coordinating Council has stated that there are over 6,000 pending building permits in the City of Bellingham. We all know that is not true. In fact, one of the items looked at, Bay View Towers, has been disbanded, and the property was for sale on e-bay® not long ago.

We sincerely hope that our community is not going to submit numbers to the Growth Management Hearings Board that cannot be met, and in fact, will never happen. It is exciting to plan and hope for urban villages to become a reality soon, and for the waterfront to redevelop at a rapid rate, but the fact of the matter is, *this hasn't happened yet, and probably will not happen for some time to come.* As stated above, GMA requires us to be realistic.

If these types of assertions are submitted to the Growth Board as a result of the EIS, at best they are conjecture. At worst, they are fraud, and should be avoided at all costs, lest our County face costly litigation and potential further sanctions from the State of Washington.

IV. Current Problems with Land Supply and Process with the Ten-Year Review

A. Ten-Year Review

According to Washington State's Growth Management Act,

[e]ach County that designates urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas. WASH. REV. CODE §36.70A.130 (3) (a) (2009).

The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period. The review required by this subsection may be combined with the review and the evaluation required by RCW 36.70A.215 (2009). WASH. REV. CODE §36.70A.130 (3) (b) (2009).

As stated above, our County's Comprehensive Plan's ten-year review was deemed deficient by the Western Washington Growth Management Hearings Board, which is part of the reason why we are discussing these issues.

B. Population Projections and the Ten-Year Review

Population projections are currently being discussed, and we assume will be refined, under this EIS process. These projections are being developed, at least in part, to inform the ten-year review of Whatcom County's **1997** Comprehensive Plan. We have some strong concerns with the population projections and employment forecast numbers, and that they appear to have been developed by County staff in a vacuum. It almost seems that the numbers have been developed to reflect what we want to have happen, or what we wish will happen, but not actually what has happened.

A ten-year review is supposed to be a look back at what we planned for (in this case 1997), combined with a look at what we have in place today, so that we can compare what has actually happened during the years since this Comprehensive Plan was adopted, with what we thought would happen. We are supposed to then use the knowledge we gained in doing that

to look back to assure that we can accommodate growth likely to occur over the next twenty years.

Unfortunately, the documentation that has been provided the City, in previous reports, does not contain any data relating to the 1997 Comprehensive Plan. On page 4 of the staff report, there is information about growth between 1990-2000 and there is information about growth trends between 2000 and 2008. It's all combined information about trends between 1990 and 2008.

However, the review between 1997 through 2007 and 2008 is the important part, as the 1997 Comprehensive Plan was the County's first Comprehensive Plan developed under the Growth Management Act. GMA did not come to Whatcom County until 1997, which means that the first seven years being reported here contain pre-growth management data, and cannot possibly inform our County's and City's investigations of how successful our community has been in planning under GMA.

In other words, approximately 40% of the years we are using to develop a data base for review are outside of the years we are supposed to be reviewing. In all likelihood, the proper data collection was never done, although we have no way of confirming that fact.

C. Data that Does Exist Hints that Our Community has Actually Made Progress

One possible reason for looking at the seven years of data prior to our Growth Management planning is to compare what was happening before GMA with what has gone on during the Growth Management years in regards to the City of Bellingham.

During the years of 1990-2000, seven years of which were non-GMA years, Bellingham accepted 43% of the growth in Whatcom County. Between 2000-2008, all of which *were* growth management years, Bellingham accepted 46.9% of the County's growth. This would appear to indicate that GMA is actually working the way that we want it to.

D. Population Growth and this EIS

One last point is that historically Whatcom County has exceeded the Office of Financial Management's population projections. As a result, how can an EIS that only looks at the impacts of growth below those established, by law, as most likely to occur, and established by experience, as likely to be lower than actual growth, possibly be considered to be a valid SEPS document? We are concerned that these and similar issues will be raised at the Growth Board, and once again our County will be found to be out of compliance under GMA.

E. Impact Fees and Compliance

One argument that we often hear in any urban growth area process discussion, including this one, is that one reason to hurry the ten-year review is so that the County can collect impact fees. Whatcom County is developing impact fee ordinances for schools, transportation, and parks.

However, as the attached January 27, 2009 letter from our attorney Charlie Klinge of Groen, Stephens & Klinge explains, until the County's Comprehensive Plan is found to be in compliance, the County *is not allowed to collect* impact fees. As a result to prevent further noncompliance, as a community we should develop an EIS and a ten-year review plan that uses solid data and is legally defensible.

Conclusion

We once again would like to thank the County Council and Planning Commission for holding this public hearing. We appreciate that we are embarking upon another long process, and will continue to comment on behalf of our members in the future. If you have any further questions, please do not hesitate to contact us.


Washington Practice Series TM
Current Through the 2008 Pocket Part

Environmental Law And Practice
Tim Butler[a], Matthew King[b]

Chapter 17. State Environmental Policy Act (SEPA)
C. The Environmental Impact Statement

§ 17.23. Discussion of alternatives

West's Key Number Digest

West's Key Number Digest, Environmental Law  598

Legal Encyclopedias

C.J.S., Health and Environment §§ 118 to 124, 127 to 129

The State Environmental Policy Act (SEPA) expressly requires an Environmental Impact Statement (EIS) contain a detailed discussion of alternatives to the proposed action.[1] The required discussion of alternatives to a proposed project is of major importance because it provides a basis for a reasoned decision among alternatives having differing environmental impacts.[2]

The SEPA Rules provide guidance concerning the scope of alternatives to be considered by explaining that reasonable alternatives are those that could “feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.”[3]

The SEPA Rules also detail the specific contents of the EIS alternatives discussion, requiring the alternatives section of the EIS to: describe the objectives, proponents and principal features of reasonable alternatives, including the proposed action with any mitigation measures; describe the location of alternatives; identify phases of the proposal; tailor the level of description to the significance of the environmental impacts; devote sufficiently detailed analysis to each alternative so as to permit a comparison of alternatives; present a comparison of environmental impacts of the alternatives; and discuss benefits and disadvantages of reserving implementation of the proposal to a future time.[4] The no-action alternative must be included.

One factor affecting the scope of alternatives requiring analysis is whether the project constitutes a private project.[5] For a private project proposed for a specific site, the EIS need only evaluate the no-action alternative and other reasonable alternatives for achieving the proposal's objective on the same site.[6] In contrast, for public projects, the EIS must contain a sufficient discussion of off-site alternatives.[7]

The necessary scope of the alternatives analysis will depend on what is reasonable under the circumstances; not all potential alternatives must be examined.[8] Instead, there must only be a reasonably detailed analysis of a reasonable number and range of alternatives.[9]



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[FNb] Co-Author.

[FN1] RCWA 43.21C.030.

[FN2] *Weyerhaeuser v. Pierce County*, 124 Wash. 2d 26, 38, 873 P.2d 498, 504 (1994).

[FN3] WAC 197-11-440(5)(b). See *King County v. Central Puget Sound Growth Management Hearings Bd.*, 91 Wash. App. 1, 951 P.2d 1151 (Div. 1 1998); *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. State, Dept. of Transp.*, 90 Wash. App. 225, 951 P.2d 812 (Div. 2 1998). In *King County v. CPSGMHB*, the adequacy of the EIS was contested on the grounds that one alternative was not legally available. The court stated “t]here is no legal requirement that alternatives be certain or uncontested, only that they be reasonable” and upheld the adequacy of the EIS based on the uncertain legal status of the challenged alternative. *King County v. Central Puget Sound Growth Management Hearings Bd.*, 91 Wash. App. 1, 951 P.2d 1151 (Div. 1 1998).

[FN4] WAC 197-11-440(5)(c).

[FN5] A private project is any proposal primarily initiated or sponsored by an individual or entity other than an agency. WAC 197-11-780.

[FN6] WAC 197-11-440(5)(d).

[FN7] *Weyerhaeuser v. Pierce County*, 124 Wash. 2d 26, 873 P.2d 498 (1994). However, the distinction between public versus private projects is not always simple. In *Weyerhaeuser*, the Court held that a proposal to build a landfill initiated and sponsored by a private entity constituted a public project because the handling and disposal of solid waste is a governmental function. Subsequent cases have clarified that not all solid waste handling facility proposals will be deemed public projects. *Organization to Preserve Agr. Lands v. Adams County*, 128 Wash. 2d 869, 913 P.2d 793 (1996).

[FN8] *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wash. App. 439, 443, 832 P.2d 503, 505 (Div. 3 1992), review denied, 120 Wash. App. 2d 1012, 844 P.2d 435 (1992).

[FN9] R. L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 14. See *King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wash. 2d 161, 979 P.2d 374 (1999) (where the court held that a higher density alternative was reasonable because the CPSGMHB had not shown that the higher density alternative would have more adverse environmental impacts than the proposal.).

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24 WAPRAC § 17.23

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January 27, 2009

The Honorable Whatcom County Council
311 Grand Avenue
Bellingham, Washington 98225

Re: Courtesy Advisory – Impact Fees and PDS “Applicant Signature” Form

Dear Council Members:

This firm represents the Building Industry Association of Whatcom County (BIAWC). This letter is intended to briefly bring to your attention to two legal problems of concern to BIAWC.

The first issue is the Council’s consideration of development impact fees under RCW 82.02.050, and that these fees cannot be adopted unless and until the Comprehensive Plan is brought into compliance. RCW 82.02.05(4) states that the County’s authorization to **collect and expend** impact fees is contingent on adopting or revising a comprehensive plan “in compliance with RCW 36.70A.070” and having an adequate capital facilities plan. The Growth Board decision of October 13, 2008 states that: “The lack of text to describe the adopted comprehensive land use map designations and the inconsistency between the comprehensive land use map and the Subarea Plan does not comply with RCW 36.70A.070.” Therefore the Growth Board decision is on point in declaring lack of compliance on RCW 36.70A.070, which is the legal precursor authorizing collection and expenditure of impact fees. The County has no legal authority to adopt an impact fee ordinance unless and until the Comprehensive Plan is brought into compliance.

The second issue relates to a form created by Planning and Development Services entitled “Applicant Signature,” and is related to payment of permit fees. However, this form is patently illegal. The form requires the applicant to agree that venue for, “any action involving their rights or obligations related to this application shall be in Whatcom County” and “in accordance with laws of the State of Washington.” This provision is not restricted and on its face applies to all rights related to the application. That means that the form is attempting to coerce the applicant into waiving their rights under the federal Civil Rights Act to have their constitutional rights determined under federal law in federal court. This the County cannot legally do, and thus, the form itself is a violation of the Civil Rights Act. Applicants also have state law rights to have disputes against the County heard in a different county, and that right is also illegally impaired. Finally, the second paragraph seeks to coerce a “personal guarantee” for fees out of any person signing for a company. Again, there is no basis in the law to impose personal liability for fees

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January 27, 2009
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upon an individual (officer, employee or member) representing an entity such as a corporation or a limited liability company. This arbitrary demand is being illegally forced upon applicants.

Please be advised of these legal problems and take action accordingly.

Sincerely,

GROEN STEPHENS & KLINGE LLP


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