

# Road Map to the Revolution: A Practical Guide to Procedural Issues Before the Growth Management Hearings Boards

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## I. INTRODUCTION

The adoption of the Washington Growth Management Act (GMA or “the Act”)<sup>1</sup> marked a major change in local government land use decision-making in the State of Washington. The Act’s requirement that local governments adopt a comprehensive land use plan (Plan) to guide development consistent with goals adopted by the state legislature and then implement that Plan with consistent regulations<sup>2</sup> was a revolutionary step toward statewide land use planning. Much has been written about the “GMA revolution.” These writings primarily focus on the GMA’s procedural and substantive requirements for adoption of Plans and how these mandates have changed the face of land use planning in Washington State.<sup>3</sup>

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1. WASH. REV. CODE § 36.70A (1998).

2. See WASH. REV. CODE §§ 36.70A.040, .120. [All citations to ch. 36.70A of the Revised Code of Washington are to the 1998 edition unless otherwise indicated - Eds.]

3. See, e.g., Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present and Future*, 16 U. PUGET SOUND L. REV., 867-948 (1993). For an overview of the GMA, with a particular emphasis on the 1997 amendments to the statute, see Jared B. Black, *The Land Use Study Commission and the 1997 Amendments to Washington State’s Growth Management Act*, 22 HARV. ENVTL. L. REV. 559 (1998).

The procedure by which planning disputes are resolved under the GMA is also an important aspect of the GMA revolution, but one that is often overlooked. The manner in which disputes are resolved under the GMA has tremendous implications for the success or failure of the substantive mandates of the Act. The GMA embodies not only a radical change in the manner in which land use planning decisions must be made, but also a major change in the way those decisions are appealed and reviewed. The GMA established a new administrative body and appeal process for local land use planning decisions with the creation of the Growth Management Hearings Boards and their petition procedures.<sup>4</sup> Two important factors that have influenced the character of the GMA revolution are the scope of the Boards' review jurisdiction and the showing that the parties must make to participate in the GMA debate before the Boards.

This Article examines the procedures by which GMA Plans are challenged and reviewed. While the procedural aspects of the GMA are more mundane than its lofty goals, these procedures are an important "road map" for the greater GMA revolution. This Article is not intended to be an exhaustive discussion of the nuances of each of the procedural issues that arise in Growth Management Hearings Board proceedings. Indeed, most of those issues are sufficiently complex that each would provide the fodder for separate articles. Rather, this Article is intended to provide a practical guide to practitioners seeking to avoid the considerable "potholes" on the road to final resolution of GMA appeals.<sup>5</sup>

This Article first examines the shift since the enactment of the GMA from a concentration on appeals of projects to appeals of legislative enactments and the resulting importance of the Growth Management Hearings Boards. The Article next addresses two major procedural issues that arise in Growth Management Hearings Board proceedings: (1) issues relating to subject matter jurisdiction, and (2) issues relating to the standard of review and burden of proof. Finally, this Article addresses a number of miscellaneous procedural issues that have the potential for creating roadblocks in Growth Management Hearings Board proceedings.

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4. See WASH. REV. CODE § 36.70A.250-.310.

5. This Article is directed toward practitioners handling cases before the Growth Management Hearings Boards, and therefore assumes a familiarity with the basic workings of the GMA. For an overview of the GMA, please refer to the numerous articles cited herein. For a broad, fairly general discussion of Growth Management Hearings Board procedures without a discussion of the procedural problems created by the Boards' decisions, see Wm. H. Nielsen et al., *Practice and Procedure Before the Growth Planning Hearings Boards*, 16 U. PUGET SOUND L. REV. 1323 (1993).

## II. THE GMA SHIFTS FOCUS FROM APPEALS OF PROJECTS TO APPEALS OF PLANS

One of the revolutionary features of the GMA was mandatory comprehensive planning for most jurisdictions, along with a requirement that land use plans be implemented with consistent regulations.<sup>6</sup> Previously, while comprehensive planning was authorized and was undertaken by many jurisdictions, it was not required. Further, comprehensive plans were merely a blueprint for more specific zoning regulations, which might significantly diverge from the Plan.<sup>7</sup> The GMA appeared to reverse this rule—title 36, chapter 70A, section .040 of the Revised Code of Washington (RCW) mandates that local governments adopt regulations consistent with their Plans.<sup>8</sup> Most commentators assumed that under the GMA, in the event of conflicts between the Plan and regulations, the Plan would control.<sup>9</sup> Although this assumption was called into question to some extent by one of the first Washington Supreme Court decisions to address the GMA,<sup>10</sup> the effect of comprehensive planning decisions on actual development proposals takes on new importance given the GMA requirement that development regulations be consistent with the Plan.

Just as the GMA shifted the focus of local government land use decisions from ad hoc individual project decisions to the underlying comprehensive land use planning decisions, so the “action” in the land use debate shifted from project decisions to the arena of GMA Plans and their implementing regulations. This new focus on the importance of GMA Plans also changed the focus of land use appeals. Before the enactment of the GMA, the major source of land use litigation was appeals of individual project approvals, or “quasi-judicial” decisions. There were only occasional challenges to local comprehensive plan designations, or “legislative” decisions. The enactment of the GMA brought a wave of appeals of local government

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6. See Settle & Gavigan, *supra* note 3, at 915.

7. See *id.* at 875-80. See also *Cougar Mountain Assoc. v. King County*, 111 Wash 2d 742, 757, 765 P.2d 264, 272 (1988); *Barrie v. Kitsap County*, 93 Wash 2d 843, 848-49, 613 P.2d 1148, 1152 (1980).

8. WASH. REV. CODE § 36.70A.040(3)(d) provides: “[I]f the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan.”

9. See Settle & Gavigan, *supra* note 3, at 915.

10. In *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash. 2d 861, 873-74, 947 P.2d 1208, 1214-15 (1997), the court relied on pre-GMA decisions without discussing GMA's apparent reversal of the former rule when it held that specific pre-GMA zoning regulations prevailed over a Comprehensive Plan adopted under GMA.

planning decisions.<sup>11</sup>

### III. THE GROWTH MANAGEMENT HEARINGS BOARDS—MAJOR PLAYERS IN THE IMPLEMENTATION OF GMA

The GMA created an entirely new type of administrative review body—a Growth Management Hearings Board (GMHB)—to hear appeals regarding whether local government Plans and regulations meet the requirements of the Act.<sup>12</sup> In recognition of regional differences within the state, the statute established three different GMHBs, each with a separate regional jurisdiction.<sup>13</sup> The GMHBs have had a major impact, both substantively and procedurally, on local governments' land use planning decisions and on the parties affected by those decisions.

The fundamental reason for the importance of the GMHBs in the GMA scheme is the legislature's decision to use general language in the Act's substantive provisions. For example, the GMA's thirteen goals are stated in broad and aspirational terms (e.g. "Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development," "Encourage efficient multimodal transportation systems," "Maintain and enhance natural resource-based industries"<sup>14</sup>), and often express competing policies (e.g., "Encourage economic development," "Protect the environment"<sup>15</sup>). Such aspirational statements leave a great deal of room for interpretation. In addition,

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11. It is notable that even after the advent of GMA there remains ample authority and, in fact, clearer appeal procedures with which to challenge individual project permitting decisions. See WASH. REV. CODE ch. 36.70B (Land Use Petition Act). However, these individual project appeals do not go to the GMHBs, but rather continue to be within the jurisdiction of the superior court. This is in contrast to the State of Oregon's growth management legislation, where an administrative appeal body, the Land Use Board of Appeals (LUBA), hears both challenges to comprehensive plan amendments as well as individual project appeals prior to judicial appeals. See Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 ENVTL. L. REP., 10367, 10373 (1992). There has been some suggestion that the Oregon system is preferable for strong GMA enforcement because prohibiting the administrative body that hears GMA planning appeals from hearing individual project appeals detracts from the body's effectiveness in enforcement of GMA's mandates. However, that topic exceeds the scope of this Article. For a discussion of the differences between Washington's and Oregon's Land Use Planning and Growth Management Acts, see Hong N. Huynh, Comment, *Administrative Forces in Oregon's Land Use Planning and Washington's Growth Management*, 12 J. ENVTL. L. & LITIG. 115, 137-38 (1997).

12. WASH. REV. CODE §§ 36.70A.250-.310.

13. The Eastern Washington Board has jurisdiction over counties east of the crest of the Cascade mountains; the Central Puget Sound Board has jurisdiction over King, Pierce, Snohomish and Kitsap Counties; and the Western Washington Board has jurisdiction over all counties west of the Cascade mountains not included in the Central Puget Sound Board's jurisdiction. WASH. REV. CODE § 36.70A.250.

14. WASH. REV. CODE § 36.70A.020(2), (3), (8).

15. WASH. REV. CODE § 36.70A.020(5), (10).

several of the key concepts in the GMA, such as what constitutes "urban" or "rural" development, were only very generally described,<sup>16</sup> leaving additional room for interpretation.<sup>17</sup> Because local Plans are often challenged by at least one of the opposing forces in the local land use debate, the GMHBs have had numerous opportunities to interpret, and even mold, these somewhat vague statutory provisions.<sup>18</sup>

Furthermore, while the statute provides that local governments' Plans are "presumed valid,"<sup>19</sup> the GMHBs have taken a very activist role in interpreting the statute, invalidating significant portions of local plans for noncompliance with the GMA.<sup>20</sup> Indeed, the GMHBs have taken such an active role in second-guessing local governments' interpretation and application of the GMA that they have been accused of unauthorized "rulemaking."<sup>21</sup> This concern over the active role of the GMHB led the legislature to adopt amendments intended to cut back on their power to overturn local government decision-making and to strengthen the presumption of validity accorded to local plans and regulations.<sup>22</sup>

Because the GMHBs have become a major force in the interpre-

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16. WASH. REV. CODE § 36.70A.030(15) provides: "Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element."

RCW 36.70A.030(17) provides: "'Urban growth' refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170."

17. See Nielsen et al., *supra* note 5, at 1324 ("In addition, several provisions of the GMA were the product of painful and acrimonious debate and were less than models of clarity.")

18. For a discussion of the extensive criticism levied at the GMHBs and their decisions, see Black, *supra* note 3, at 574; Huynh, *supra* note 11, at 137-38; Derek W. Woolston, Comment, *Simply a Matter of Growing Pains? Evaluating the Controversy Surrounding the Growth Management Hearings Boards*, 71 WASH. L. REV. 1219 (1996).

19. WASH. REV. CODE § 36.70A.320(1).

20. See, e.g., Wells v. Whatcom County, Western Washington Growth Management Hearings Board (WWGMHB) No. 97-2-0030c, Final Decision and Order (Jan. 16, 1998); Bremerton v. Kitsap County, Central Puget Sound Growth Management Hearings Board (CPSGMHB) No. 95-3-0039, Final Decision and Order (Oct. 6, 1995).

21. See Sky Valley v. Snohomish County, CPSGMHB No. 95-3-0068c, Final Decision and Order (Mar. 12, 1996).

22. See WASH. REV. CODE § 36.70A.290(1) (prohibiting advisory opinions); WASH. REV. CODE § 36.70A.320(3) (replacing "preponderance of evidence" with "clearly erroneous" standard); WASH. REV. CODE § 36.70A.320(1) (legislative intent to apply more deferential standard). For a detailed comparison of the "preponderance of evidence" standard with the "clearly erroneous" standard, see Black, *supra* note 3, at 576. For a discussion of the difficulties that arose from the GMHBs' prior interpretations of the "preponderance of the evidence" standard, see Huynh, *supra* note 11, at 141-42; and Woolston, *supra* note 18, at 1240-41.

tation and application of the GMA to local government planning decisions, procedural issues related to obtaining review of GMA decisions have become more important. In addition, the scope of the GMHBs' subject matter jurisdiction is a key determinant of the extent of the GMHBs' authority to interpret the GMA and the GMA's relationship with other statutory mandates. The scope of participants' standing to appeal local GMA planning decisions is important in determining who the parties in the GMA debate will be and which issues will be championed. The process by which GMA matters may be appealed, along with numerous potential procedural pitfalls, impact the issues that will come within the GMHBs' purview. Thus, careful attention to procedural issues may greatly influence substantive outcomes in GMA cases.

#### IV. SURVEY OF GMHB PROCEDURAL DECISIONS

One of the beneficial aspects of the new emphasis on GMHB decisions in land use litigation is a less obscure set of procedures for appeal of legislative land use decisions. Gone are the days when all such appeals required an intimate knowledge of the numerous judicially created procedural requirements for constitutional writs of certiorari. Those procedures have now been replaced by statutory and administrative provisions governing procedures before the GMHBs.<sup>23</sup> These new procedures, and their interpretation by the GMHBs, have had important implications for which GMA matters have been cognizable and which parties have been heard.

Some of the procedural rules for the GMHBs are expressly stated in the GMA.<sup>24</sup> In other instances, the GMHBs have established their own rules of procedure.<sup>25</sup> Finally, in the absence of some other governing provision, the rules established in the Administrative Procedure Act (APA)<sup>26</sup> also apply to proceedings before the GMHBs, unless they conflict with a specific provision of the GMA.<sup>27</sup>

In spite of these layers of procedural guidelines (or perhaps because of them), the different GMHBs have reached divergent decisions on issues ranging from the scope of their subject matter jurisdiction to the extent of their remedial powers.<sup>28</sup> Although appellate

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23. See WASH. REV. CODE §§ 36.70A.270-.340.

24. See, e.g., WASH. REV. CODE § 36.70A.280 (requirements for petitions to Growth Management Hearings Boards).

25. See WASH. ADMIN. CODE § 242-02-110 (1999).

26. WASH. REV. CODE ch. 34.05 (1998).

27. WASH. REV. CODE § 36.70A.270(7).

28. The reader will note that the discussion of GMHB decisions that follows primarily discusses decisions by two of the three GMHBs—the Western Washington GMHB and the

courts are beginning to issue decisions that resolve some of these differences, these varying interpretations require that the land use practitioner take a cautious approach in litigation before the GMHBs.<sup>29</sup>

To aid in navigating this process, following is a survey of some of the key procedural decisions by the GMHBs, analysis of the importance of these decisions, and some tips for the land use practitioner.

### A. Subject Matter Jurisdiction of the GMHBs

#### 1. Overview

The GMHBs have jurisdiction to review petitions alleging that a state agency, county, or city plan under the GMA is not in compliance with: (1) the requirements of the GMA; (2) the Shoreline Management Act as it relates to shoreline master programs and amendments thereto; or (3) SEPA as it relates to plans, development regulations, or amendments adopted under the GMA or the Shoreline Management Act.<sup>30</sup> In addition, the GMHBs review petitions alleging that the twenty-year population projections published by the State's Office of Financial Management should be adjusted.<sup>31</sup> The vast majority of petitions before the GMHBs to date have challenged whether a local government plan under the GMA complies with the Act.

The Western Washington GMHB and the Central Puget Sound GMHB have taken different approaches in deciding which types of local enactments that they have jurisdiction to review. The Central Puget Sound GMHB has narrowly construed its jurisdiction to extend only to review of ordinances enacted in an effort to comply with the GMA.<sup>32</sup> Conversely, the Western Board has held that it has jurisdiction to review whether *any* land use planning action complies with the

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Central Puget Sound GMHB. This focus is not intended to in any way diminish the significance of the Eastern Washington GMHB. However, because that Board has issued far fewer decisions than the other two GMHBs, the Eastern Washington GMHB has simply not addressed many of the procedural issues discussed in this Article.

29. These varied interpretations are at least partially the result of the Central and Western Boards' refusal to consider each others decisions "binding." See, e.g., *Island County Citizens' Growth Management Coalition v. Island County*, WWGMHB No. 98-2-0023c, Final Decision and Order (Mar. 1, 1999); *West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 94-3-0006, Final Decision and Order (Apr. 4, 1995). See also Black, *supra* note 3, at 575; Huynh, *supra* note 11, at 138-39; Woolston, *supra* note 18, at 1245-48.

30. See WASH. REV. CODE § 36.70A.280(1)(a). As noted above, the GMHBs do not have jurisdiction to review local government decisions to approve or disapprove permits for individual land use projects.

31. See WASH. REV. CODE § 36.70A.280(1)(b).

32. See, e.g., *City of Auburn v. Pierce County*, CPSGMHB No. 97-3-0013, Order Granting Dispositive Motion (May 1, 1997).

GMA, regardless of whether it was adopted under the Act.<sup>33</sup>

## 2. Substantive Implications of the GMHBs' Jurisdictional Decisions

How broadly or narrowly the GMHBs construe their subject matter jurisdiction can have important substantive implications for the integrity of the GMA planning system. For example, the GMA requires that local governments establish Urban Growth Areas (UGAs), which are the only areas in which urban growth and urban services such as water and sewer are allowed.<sup>34</sup> The GMA also states that cities are to be the primary providers of these urban services.<sup>35</sup> However, other statutes predating the GMA, such as the Public Water System Coordination Act,<sup>36</sup> also impact how the jurisdictional boundaries for water and sewer service are determined. If the GMHB does not have jurisdiction to reconcile conflicts between GMA mandates regarding the provision of water and sewer services and the mandates of other statutes that address the same issues, local governments could potentially rely on these other statutes to subvert the provisions of the GMA.

An example of this potential for conflict arose in *Auburn v. Pierce County*.<sup>37</sup> Pierce County determined in its GMA plan that a certain area should be within the City of Auburn's UGA. However, the county had previously adopted a Comprehensive Water System Plan (CWSP) designating the City of Bonney Lake as the provider of water service within a portion of Auburn's UGA. That CWSP was adopted as an appendix to the county's Comprehensive Plan. In updating its CWSP, the county refused to modify Bonney Lake's water service area to make it consistent with the county's UGA designations.<sup>38</sup>

Auburn appealed to the Central Puget Sound GMHB, arguing that the GMHB should require the county to revise its CWSP to designate Auburn as the water purveyor for all areas within its UGA to ensure consistency between the CWSP and the county's Comprehensive Plan. The Central Puget Sound GMHB refused to decide the case, ruling that the adoption of a CWSP did not arise under the GMA, but rather the Public Water System Coordination Act, chapter 70.116 of the Revised Code of Washington (RCW), a statute over

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33. See, e.g., *Rosewood Assocs. v. Town of Friday Harbor*, WWGMHB No. 96-2-0020, Order on Motion to Dismiss for Lack of Jurisdiction (Dec. 6, 1996).

34. See WASH. REV. CODE § 36.70A.030(17), (1).

35. See WASH. REV. CODE § 36.70A.110(4).

36. WASH. REV. CODE ch. 70.116 (1998).

37. CPSGMHB No. 97-3-0013, Order Granting Dispositive Motion (May 1, 1997).

38. See *id.*

which the GMHB had no jurisdiction. This left Auburn in the awkward position of challenging the consistency of the CWSP and Comprehensive Plan in superior court, which lacked jurisdiction to review the Comprehensive Plan.<sup>39</sup>

The Western Washington GMHB, in contrast, has held that its jurisdiction extends to any land use planning ordinance with a sufficient nexus to GMA, regardless of the statutory basis for adoption of that ordinance. In *Rosewood Associates v. Town of Friday Harbor*,<sup>40</sup> the petitioner challenged an ordinance limiting the size and number of water connections for developments within the Town of Friday Harbor. The town moved to dismiss the petition because the challenged ordinance was outside of the Board's subject matter jurisdiction. The Board held that its jurisdiction extended to determinations of:

whether a land use planning legislative action is in violation of the goals and requirements of RCW 36.70A. This is true whether or not the local government has chosen to adopt the legislation pursuant to RCW 36.70A, as long as there is a sufficient nexus between the action and the GMA.<sup>41</sup>

Although the GMHB ultimately dismissed petitioner's challenge, it did so only after a review of the record revealed that the town's primary intention in adopting the challenged ordinance was water conservation, not land use planning. It also did so over the dissent of one of the GMHB members.<sup>42</sup>

These situations illustrate some of the potential conflicts between the GMA and other existing statutes that bear on GMA-related topics. One could argue that it would make sense for the GMHBs to construe their jurisdiction more broadly in order to take in conflicts between other statutes and the GMA's planning mandates. On the other hand, critics of the GMHBs' activism have been reluctant to request that the GMHBs increase their jurisdiction beyond the issues that are within their statutory jurisdictional mandate. In addition, such an extension of jurisdiction arguably conflicts with the Washington Supreme Court's narrow interpretation of GMHB jurisdiction.<sup>43</sup> In any event, this is an area of confusion that would benefit from a legislative clarification.

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39. *See id.*

40. WWGMHB No. 96-2-0020, Order on Motion to Dismiss for Lack of Jurisdiction (Dec. 6, 1996).

41. *Id.* (quoting *Camano Community Council v. Island County*, WWGMHB No. 95-2-0072, Final Decision and Order (Sept. 6, 1995)).

42. *See id.*

43. *See Skagit Surveyors & Engineers, LLC v. Skagit County*, 135 Wash. 2d 542, 958 P.2d 962 (1998).

### 3. Procedural Implications of the GMHBs' Interpretation of Their Jurisdiction

A petition's failure to correctly determine whether a local government planning action is subject to GMHB jurisdiction could have the significant consequence of precluding further appeals altogether. If a challenge can be brought before the GMHB, a petitioner must bring that challenge before attempting a writ action in superior court.<sup>44</sup> The divergence of GMHB opinions on the scope of their jurisdiction adds to the confusion and creates potential procedural roadblocks for the unwary.

The Washington Supreme Court's recent decision in *Torrance v. King County*<sup>45</sup> highlights the importance of obtaining a final determination of whether a legislative challenge is within the jurisdiction of the GMHBs before proceeding to court. *Torrance* addressed an issue that had been the source of some confusion under GMA: determining the proper procedural vehicle for challenging a local government's refusal to adopt a proposed amendment to its GMA Comprehensive Plan. The Central Puget Sound GMHB had held that it did not have jurisdiction to review the failure to adopt a suggested Comprehensive Plan amendment.<sup>46</sup> Accordingly, some practitioners believed that a constitutional writ of certiorari provided the proper means of challenging such local government inaction, because such a writ is available when no other adequate remedy exists and a local government's decision is arbitrary and capricious.<sup>47</sup>

The *Torrance* court disagreed, finding that statutory review before the GMHB provided a means of seeking relief for the county's failure to adopt the suggested Plan amendment.<sup>48</sup> Although the petitioner had filed a petition for review with the GMHB, and the GMHB had refused to review that petition,<sup>49</sup> the court noted that the peti-

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44. See, e.g., *Torrance v. King County*, 136 Wash. 2d 783, 966 P.2d 891 (1998).

45. *Id.*

46. See *City of Fircrest v. Pierce County*, CPSGMHB No. 98-3-0002, Order on Dispositive Motion (Mar. 27, 1998); *Port of Seattle v. City of Des Moines*, CPSGMHB No. 97-3-0014, Final Decision and Order (Aug. 13, 1997); *Cole v. Pierce County*, CPSGMHB No. 96-3-0009c, Final Decision and Order (July 31, 1996)

47. See, e.g., *Saldin Sec., Inc. v. Snohomish County*, 134 Wash. 2d 288, 292, 949 P.2d 370, 372 (1998); *Williams v. Seattle School Dist. No. 1*, 97 Wash. 2d 215, 221, 643 P.2d 426, 430 (1982).

48. See *Torrance*, 136 Wash. 2d at 791-92, 966 P.2d at 895-96.

49. See *Torrance v. King County*, CPSGMHB No. 96-3-0038, Order Granting Dispositive Motion (Mar. 31, 1997) ("[N]either can Petitioners challenge the county's decision not to adopt Petitioners' proposed amendments.") In fact, in dismissing the *Torrance* petition, the Central Puget Sound GMHB quoted its own previous decision in *Cole v. Pierce County*, CPSGMHB No. 96-3-0009c, Final Decision and Order (July 31, 1996), wherein the Board held that "recourse is elsewhere" for a challenge to a local government's failure to adopt a proposed

tioner had failed to file a judicial appeal of the GMHB decision that the GMHB lacked jurisdiction. Thus, the court ordered that the petitioner's constitutional writ action be dismissed.

The lesson from *Torrance* may well be that when there is any doubt as to whether a challenge is within the GMHB's jurisdiction, a petitioner should file a petition for review in the GMHB as well as a petition for a constitutional writ in the superior court. In the exercise of an abundance of caution, these petitions should be filed simultaneously, lest one be rejected as untimely.<sup>50</sup> In addition, a petitioner should judicially appeal a GMHB decision holding that it lacks jurisdiction, to ensure that all potential avenues of appeal remain viable.

At this point, jurisdictional issues can pose significant problems for petitioners before the GMHB. Perhaps these issues will ultimately be resolved by the legislature or the courts. In the meantime, these issues should be carefully scrutinized by practitioners challenging local governments' legislative actions.

## B. Standing to Raise Issues Before the GMHB

### 1. Standing Based Upon Participation

Another important procedural issue is the question of standing to appeal local government GMA enactments to the GMHB. Unfortunately, standing is another point of disagreement between the Western Washington GMHB and the Central Puget Sound GMHB.

The GMA confers standing on four groups of people:

1. The state or a county or city that plans under GMA;<sup>51</sup>
2. A person who has "participated orally or in writing before the county or city regarding the matter on which review is being requested;"<sup>52</sup>

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Comprehensive Plan amendment.

50. A GMHB petition for review of a GMA enactment must be filed within 60 days of publication of the notice of adoption of the challenged enactment. WASH. REV. CODE § 36.70A.290(2). Cf. *City of Bellevue v. East Bellevue Community Council*, 91 Wash. App. 461, 468, 957 P.2d 267, 270 (1998) (holding that 30 day time period applies to constitutional writ of certiorari, but finding factual allegations in timely complaint sufficiently requested constitutional writ, even though such relief was not specifically requested).

51. See WASH. REV. CODE § 36.70A.280(2)(a). But see WASH. REV. CODE § 36.70A.310, which limits appeals by the state.

52. WASH. REV. CODE § 36.70A.280(2)(b). For organizations, the Central Puget Sound GMHB has been fairly stringent in requiring that the representatives testifying on behalf of the organization so identify themselves before the local government. See, e.g., *Banigan v. Kitsap County*, CPSGMHB No. 96-3-0016c, Order Granting Dispositive Motion (July 29, 1996).

3. A person certified by the governor;<sup>53</sup> or
4. A person with standing under the Administrative Procedure Act, RCW 34.05.530.<sup>54</sup>

The disagreement between the GMHBs arises in the interpretation of section 2, *supra*, and how one establishes “participation standing.” The debate is over whether the quoted provision requires that a petitioner raise, in the proceedings before the local government, each issue on which he or she seeks GMHB review, or requires only that petitioners make some comment before the local government on the challenged enactment in order to then raise any issue before the GMHB.

Relying on the requirement that petitioners participate “regarding the matter on which review is being requested,” local governments have argued that petitioners’ standing should be limited to those issues that the petitioner actually raised in the local government’s adoption proceedings. The rationale for this position is that in GMHB appeals, despite the presumption of validity in favor of local government plans,<sup>55</sup> the GMHBs have required that localities show the record of their decision-making on disputed issues.<sup>56</sup> If participants do not dispute issues in the local government plan adoption proceedings, local governments are less likely to create a record supporting their decisions on those issues. If petitioners can raise those issues for the first time before the GMHB, local governments can be “blind-sided” if they are found noncompliant and forced to review an issue on remand. Such a process is cumbersome and costly for local governments.

All three GMHBs initially rejected such an “issue-specific” standing requirement.<sup>57</sup> The rationale for the GMHBs’ broad interpretation of standing seemed to hinge on the broad public participa-

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53. See WASH. REV. CODE § 36.70A.280(2)(c).

54. See WASH. REV. CODE § 36.70A.280(2)(d). In deciding whether a person can establish standing under the APA, the GMHBs have applied the two-part test of *Trepanier v. Everett*, 64 Wash. App. 380, 382, 824 P.2d 524, 525 (1992): (1) whether petitioner is in the zone of interests protected by the statute and (2) whether petitioner will suffer an injury in fact. See, e.g., *Lakehaven Utility Dist. v. City of Federal Way*, CPSCGMHB No. 97-3-0031, Order on Dispositive Motion (Mar. 6, 1998); *Jefferson County Homebuilders Ass’n v. City of Port Townsend*, WWGMHB No. 96-2-0029, Order on Motion (Nov. 27, 1996).

55. See WASH. REV. CODE § 36.70A.320(1).

56. See, e.g., *Bremerton v. Kitsap County*, CPSCGMHB No. 95-3-0039, Final Decision and Order (Oct. 6, 1995) (requiring that the county “show its work”).

57. See, e.g., *Wells v. Whatcom County*, WWGMHB No. 97-2-0030c, Order Denying Motion and Request for Reconsideration (Oct. 10, 1997); *Bremerton v. Kitsap County*, CPSCGMHB No. 95-3-0039c, Order on Motion (Apr. 22, 1997); *Woodmansee v. Ferry County*, Eastern Washington Growth Management Hearings Board (EWGMHB) No. 95-1-0010, Final Decision and Order (May 13, 1996).

tion focus in the GMA, of which the GMHBs considered themselves to be an integral part.<sup>58</sup>

More recently, however, the issue has become less clear. The Whatcom County Superior Court reversed the Western Washington GMHB's decision in *Wells v. Whatcom County*,<sup>59</sup> holding that the GMA limits a petitioner's standing to appeal a local government enactment to those matters that a petitioner raised before the local government.<sup>60</sup> The court's decision was based strictly on an interpretation of the plain language of RCW 36.70A.280(2)(b), which requires participation "regarding the matter" on which review is being requested. The court held that this provision clearly required that petitioners raise all issues in a GMHB proceeding before the local government.<sup>61</sup> This decision is currently on appeal before Division I of the Washington Court of Appeals.<sup>62</sup>

Shortly thereafter, the Central Puget Sound GMHB, although professing to continue its rejection of "issue-specific standing," ruled:

To have meaningful public participation and avoid "blind-siding" local governments, members of the public must explain their land-use planning concerns to local government in sufficient detail to give the local government the opportunity to consider these concerns as it weighs and balances its priorities and options under GMA.<sup>63</sup>

Thus, the Central Puget Sound GMHB now interprets RCW 36.70A.280(2)(b) as requiring that petitioners raise their complaints in a meaningful fashion before the local government during the GMA adoption process.<sup>64</sup> The Central Puget Sound GMHB's decision was

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58. See *Island County Citizens Growth Management Coalition v. Island County*, WWGMHB No. 98-2-0023, Order on Dispositive Motions (Mar. 2, 1999). The GMA originally required only that petitioners "appear," as opposed to "participate." Some GMHB members believed that the standing requirement could be met by simply attending, as opposed to participating in, local government proceedings. See, e.g., Nielsen, *supra* note 5, at 1327.

59. WWGMHB No. 97-2-0030c, Order on Denying Motion and Request for Reconsideration (Oct. 10, 1997).

60. See *Whatcom County v. Western Wash. Growth Management Hearings Bd.*, Civ. No. 98-2-00546-3 (Order Remanding Case, Sept. 25, 1998).

61. See *id.*

62. See *Whatcom County*, No. 43397-1-I (Wash. Ct. App. Division I).

63. *Alpine v. Kitsap County*, CPSGMHB No. 98-3-0032c, Order on Motions to Supplement the Record (Oct. 7, 1998). The Central Puget Sound GMHB went on to articulate the test for determining whether a petitioner has met its participation standing requirements as follows:

If a petitioner's participation is reasonably related to the petitioner's issue as presented to the Board, then the petitioner has standing to raise and argue that issue; if the petitioner's participation is not related to the issue as presented to the Board, then the petitioner does not have standing to raise and argue the issue.

*Id.*

64. The Central Puget Sound GMHB also made clear that the petitioner who is raising the

based on the importance given to the local planning process and the opportunities for participation in that process.

Given the difference of opinion as to whether the GMA requires "issue-specific" standing, participants would be well advised to raise all issues that may ultimately form the basis of a GMHB appeal in the proceedings before the local government. Such participation will also help ensure that the participant will have material in the record to bolster his or her case because, as discussed below, the petitioner bears the burden of proof in most proceedings before the GMHB.<sup>65</sup> In addition, a full debate on the issues before the local government might obviate the need for some appeals, as the parties may better evaluate the merits of their positions and come to a consensus during the plan adoption phase.

Finally, it is worth noting that if a petitioner can establish standing on some basis other than participation before the local government (e.g., if a petitioner has standing under the APA's standing requirements<sup>66</sup>), the issue-specific participation requirements of RCW 36.70A.280(2)(b) arguably do not apply. Thus, if a petitioner can argue that he or she has suffered an injury within the zone of interests protected by GMA,<sup>67</sup> this argument should be included in the petition.

## 2. Standing to Raise Issues Under the State Environmental Policy Act

The GMHBs' jurisdiction extends to deciding whether a local government's GMA adoptions are consistent with the State Environmental Policy Act (SEPA), RCW chapter 43.21C.<sup>68</sup> The GMHBs have also reached different conclusions as to the requirements for obtaining standing to raise SEPA challenges.

To determine whether a petitioner has standing to raise challenges under SEPA, the Central Puget Sound GMHB has adopted the two part test embodied in *Trepanier v. Everett*<sup>69</sup> for judicial review of SEPA issues: (1) that petitioners are within the zone of interests protected by SEPA and (2) that the local government's failure to comply

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issue before the Board must be the person that raised the issue in the local government adoption proceedings. See *Alpine*, CPSGMHB No. 98-3-0032c (Oct. 7, 1998) ("[Petitioner] itself must have participated 'regarding the matter' it wants the Board to review; it cannot establish standing solely based on the participation of another.")

65. See WASH. REV. CODE § 36.70A.320(2).

66. See WASH. REV. CODE § 36.70A.280(4).

67. See *supra* note 54.

68. See WASH. REV. CODE § 36.70A.280(1).

69. 64 Wash. App. 380, 382, 824 P.2d 524, 525 (1992).

with SEPA has caused an injury-in-fact to petitioners.<sup>70</sup> Although the Central Puget Sound GMHB has noted that this test is difficult to meet with respect to legislative enactments, it has consistently refused to adopt a less stringent SEPA standing requirement.<sup>71</sup>

The Western Washington GMHB, on the other hand, has refused to apply the *Trepanier* test to determine SEPA standing before the GMHB.<sup>72</sup> Instead, the Western Washington GMHB only requires that a petitioner meet the standing requirements of the GMA (RCW 36.70A.280(2)) to raise a SEPA challenge before the Board.<sup>73</sup>

The Western Washington GMHB and Central Puget Sound GMHB also disagree on whether a petitioner is required to exhaust available administrative remedies before raising a SEPA challenge before the GMHB. The Central Puget Sound GMHB requires exhaustion of available administrative remedies.<sup>74</sup> Conversely, the Western Washington GMHB has not required exhaustion of administrative remedies as a precondition to raising a SEPA challenge before the GMHB.<sup>75</sup>

The Western Washington GMHB's SEPA standing and exhaustion decisions have the benefit of implementing a single jurisdictional test for all GMHB challenges, regardless of whether they relate to noncompliance with GMA or noncompliance with SEPA. However,

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70. See *Kelly v. Snohomish County*, CPSGMHB No. 97-3-0012c, Order on Dispositive Motions and Motions to Supplement the Record (May 8, 1997) ("The petition must allege that petitioners are within the zone of interests protected by SEPA and that the SEPA determination will cause specific and perceptible harm." (citations omitted)); *Vashon-Maury v. King County*, CPSGMHB No. 95-3-0008, Final Decision and Order (Oct. 23, 1995) ("Crucially, to assert SEPA standing, petitioners must show that they are within the zone of interests protected by SEPA and allege an injury in fact in the petition for review."). Although this standing test is the same as the APA standing test, the Central Puget Sound GMHB has noted that a petitioner with standing under the APA does not necessarily also have standing to raise a SEPA challenge. *Rural Bainbridge Island v. City of Bainbridge Island*, CPSGMHB No. 98-3-0030, Order on Dispositive Motion (Oct. 16, 1998) (noting that the protected interests are different under GMA and SEPA).

71. See *Pilchuck v. Snohomish County*, CPSGMHB No. 95-3-0047c, Order Granting Snohomish County's Dispositive Motion to Dismiss SEPA Claims (Aug. 17, 1995) ("The Board itself has repeatedly acknowledged the difficulty for petitioners to demonstrate the 'specific injury' . . . and thus to obtain SEPA standing. In addition, the Board has pointed out that the common-law SEPA standing test is 'inappropriate' in a GMA context. Nonetheless, until the test is modified by the courts, or the legislature amends the SEPA standing statute, this Board is bound by the test.").

72. See, e.g., *Island County Citizens' Growth Management Coalition v. Island County*, WWGMHB No. 98-2-0023c, Order on Motion to Dismiss (Mar. 1, 1999).

73. See *id.*

74. See *Hapsmith v. City of Auburn*, CPSGMHB No. 95-3-0075c, Final Decision and Order (May 10, 1996).

75. See *Island County Citizens' Growth Management Coalition*, 98-2-0023c WWGMHB (Mar. 1, 1999).

those decisions interpret the GMA provisions to permit SEPA challenges that would not be permitted under the analogous SEPA provisions. As the Central Puget Sound GMHB noted, had the legislature intended such a fundamental expansion of SEPA review, it would likely have expressly stated that intention in either the GMA or SEPA. In light of the Washington Supreme Court's narrow construction of GMHB jurisdiction, the Western Washington GMHB's interpretation of the requirements for SEPA standing and exhaustion may be subject to attack on judicial appeal.

### C. *Standard of Review/Burden of Proof*

As noted in the introductory section of this Article, the GMHBs have been criticized for being somewhat overzealous in their review of local governments' GMA enactments.<sup>76</sup> In response to that criticism, in 1997, the legislature increased the standard of review for GMHB appeals from the previous "preponderance of evidence" standard to the more deferential "clearly erroneous" standard.<sup>77</sup> In a statement of purpose, the legislature made clear that its intent was to provide greater deference to local government decision-making:

In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.<sup>78</sup>

In recognition of this legislative intent, recent GMHB decisions appear to accord more deference to local government decisions, often finding that petitioners have failed to convince the GMHBs that local

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76. See *supra* note 18.

77. See former WASH. REV. CODE § 36.70A.320(3) (1990).

78. WASH. REV. CODE § 36.70A.3201.

government actions were “clearly erroneous.”<sup>79</sup>

In most proceedings before the GMHBs, the petitioner bears the burden of proof.<sup>80</sup> The exception to this general rule occurs when the GMHB declares a local government’s GMA enactment “invalid” because it substantially interferes with the goals of the GMA.<sup>81</sup> The GMHB is permitted to make such a determination after a finding of noncompliance if the Plan or regulations are thought to substantially interfere with the goals of the GMA.<sup>82</sup> At a compliance hearing after a determination of invalidity has been entered, the local government bears the burden of proving that “the ordinance or resolution it has enacted in response to a determination of invalidity will no longer substantially interfere” with the goals of GMA.<sup>83</sup>

It is unclear, however, what happens in the situation where a local government takes no action in response to a GMHB invalidity determination and then adopts another GMA enactment. For example, a county that has not yet adopted its GMA Comprehensive Plan may adopt an ordinance enacting Interim Urban Growth Areas pursuant to RCW 36.70A.110(4). The GMHB may then declare those Interim Urban Growth Areas invalid. Rather than enacting new Interim Urban Growth Area designations in response to the GMHB’s invalidity determination, the county may proceed with adoption of its Comprehensive Plan. When that Plan is adopted, does the petitioner or the county bear the burden of proof?

The Western Washington GMHB addressed this situation in *Wells v. Whatcom County*.<sup>84</sup> There, the Western Washington GMHB decided that Whatcom County had the burden of proof as to those portions of its Comprehensive Plan presented by the county as responding to the GMHB’s prior determination of invalidity.<sup>85</sup> However, the Whatcom County Superior Court reversed, finding that the county’s Comprehensive Plan, including those aspects that addressed the GMHB’s prior invalidity order, was to be presumed valid, and that the petitioner bore the burden of showing that it should be found

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79. See, e.g., *Alpine v. Kitsap County*, CPSGMHB No. 98-3-0032c, Final Decision and Order (Feb. 8, 1999); *Abenroth v. Skagit County*, WWGMHB No. 97-2-0060c, Final Decision and Order (Sept. 23, 1998).

80. See WASH. REV. CODE § 36.70A.320(2).

81. See WASH. REV. CODE § 36.70A.320(4).

82. See WASH. REV. CODE § 36.70A.302(1)(a). If a Plan or regulation is invalidated, development applications submitted after the determination of invalidity vest to the plan or regulation that is ultimately determined by the GMHB to no longer substantially interfere with GMA. See WASH. REV. CODE § 36.70A.302(3)(a).

83. *Id.*

84. WWGMHB No. 97-2-0030c, Final Decision and Order (Jan. 16, 1998).

85. See *id.*

invalid or out of compliance with GMA.<sup>86</sup> The Whatcom County Superior Court's decision is currently on appeal to Division I of the Washington Court of Appeals.

#### D. Other Miscellaneous Procedural Issues

A roadmap would not be complete without a look at some of the detailed procedural requirements of GMA appeals. Because land use appeals have often been argued and decided on procedural grounds, it is important that practitioners carefully follow the statutory requirements.

##### 1. Time Limits for Filing Petitions for Review

Under the GMA, petitions for review challenging a local government's GMA enactment "must be filed within sixty days after publication by the legislative bodies of the county or city."<sup>87</sup> As to petitions challenging a local government's failure to timely adopt a required GMA enactment, the GMHBs have ruled that such a challenge may be brought at any time.<sup>88</sup>

This dichotomy has prompted some petitioners to attempt to "couch" an untimely challenge to a local government's GMA enactment in terms of a "failure to act" challenge, often a challenge to a local government's failure to adopt a "compliant" Comprehensive Plan or development regulation. The GMHBs have refused to allow such challenges, looking beyond the language of the petition to find that the petitioner was actually attempting to bring an untimely challenge to a GMA enactment.<sup>89</sup>

##### 2. Content of Petitions for Review

The GMA requires that petitions for review before the GMHBs include "a detailed statement of issues presented for resolution by the

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86. See *Whatcom County v. Western Washington Growth Management Hearings Bd.*, Civ. No. 98-2-00546-3 (Order Remanding Case, Sept. 25, 1998).

87. WASH. REV. CODE § 36.70A.290(2).

88. See, e.g., *Citizens for Mount Vernon v. City of Mount Vernon*, WWGMHB No. 98-2-0006c, Final Decision and Order (July 23, 1998); *Kitsap Citizens for Rural Preservation v. Kitsap County*, CPSGMHB No. 94-3-0005, Order on Kitsap County's Dispositive Motion (July 27, 1994).

89. See, e.g., *Lawrence Michael Investments, L.L.C. v. Town of Woodway*, CPSGMHB No. 98-3-0012, Final Decision and Order (Jan. 8, 1999); *Quail Construction, Inc. v. City of Vancouver*, WWGMHB No. 97-2-0005 Order Granting Dispositive Motion (May 6, 1997). However, the Western Washington GMHB has sustained a "failure to act" challenge based on a local government's failure to adopt development regulations implementing a GMA Comprehensive Plan even though the time for challenging that Comprehensive Plan had expired. See *Citizens for Mount Vernon*, WWGMHB No. 98-2-0006c (July 23, 1998).

board.”<sup>90</sup> More specific content requirements for petitions for review are found in the GMHBs’ procedural rules.<sup>91</sup> The GMHBs have, on occasion, strictly interpreted these content requirements, resulting in serious difficulty for some petitioners.

For example, the GMHBs’ procedural rules require that petitioners provide a detailed statement of issues “that specifies the provision of the act or other statute allegedly being violated and, if applicable, the provision of the document that is being appealed.”<sup>92</sup> The importance of this provision is heightened by the 1997 amendment to RCW 36.70A.290(1), which prohibits the GMHBs from issuing “advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order.”<sup>93</sup> The Western Washington GMHB has strictly interpreted this provision as requiring a petitioner to seek a determination of invalidity expressly questioning whether the challenged ordinance substantially interferes with the goals of GMA in the issue statement of the petition; simply requesting invalidity in the “relief requested” portion of the petition was insufficient to raise the issue.<sup>94</sup>

The GMHBs’ rules of procedure also require that petitions for review contain a statement “specifying the type and the basis of the petitioner’s standing before the board pursuant to RCW 36.70A.280(2).”<sup>95</sup> This provision requires that the petitioner distinguish between participation standing, governor certified standing, APA standing, and SEPA standing. The Central Board has interpreted this provision fairly strictly, limiting a petitioner’s potential bases for standing to those specifically alleged in the petition.<sup>96</sup> The Western Board has been less exacting, looking to whether a petitioner can actually demonstrate any basis for standing regardless of the statement in his or her petition.<sup>97</sup>

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90. WASH. REV. CODE § 36.70A.290(1).

91. See WASH. ADMIN. CODE 242-02-210 (1999).

92. WASH. ADMIN. CODE 242-02-210(2)(c) (1999). See also Nielsen, *supra* note 5, at 1328 (“These rules require you to make a detailed list of issues that you, the Petitioner, are asking the Board to decide.”).

93. See 1997 Wash. Laws 2629, ch. 429 § 12.

94. See *Citizens for Mount Vernon*, WWGMHB No. 98-2-0006c (July 23, 1998). The Board so held in spite of the fact that the “relief requested” portion of the petition requested an order of invalidity. Prior to the 1997 amendments to the GMA, the Western Washington GMHB had held that invalidity was not an “issue,” but an aspect of the relief requested in a petition. See *Hudson v. Clallam County*, WWGMHB No. 96-2-0031, Final Decision and Order (Apr. 15, 1997).

95. WASH. ADMIN. CODE § 242-02-210(d) (1999).

96. See, e.g., *Lakehaven Utility District v. City of Federal Way*, CPSGMHB No. 97-3-0031, Order on Dispositive Motions (Mar. 6, 1998).

97. See, e.g., *Jefferson County Homebuilders Ass’n v. Port Townsend*, WWGMHB No.

### 3. Service of Petitions for Review

The GMHB procedural rules also require that petitioners “promptly” serve their petitions for review on certain designated local government representatives (the county auditor for counties, and the mayor, city manager, or city clerk for cities).<sup>98</sup> If a petitioner does not substantially comply with these service requirements, the GMHB rules authorize dismissal of the petition for review.<sup>99</sup>

The Western Washington GMHB has refused to dismiss petitions for review based on the failure to properly serve the relevant local government official, noting that the service requirement is found solely in the GMHBs’ procedural rules and is not based on any provision of the GMA.<sup>100</sup> The Central Puget Sound GMHB, on the other hand, has applied these service requirements to dismiss petitions for review that were not promptly served on the designated official.<sup>101</sup>

### 4. Amendment of Petitions for Review

The GMHBs allow petitioners to amend their petitions “as a matter of right” until thirty days after the date of filing.<sup>102</sup> After that thirty day period lapses, petitioners may amend their petitions only by order of the Board, and amendments “shall not be freely granted.”<sup>103</sup> Both the Central Puget Sound and Western Washington GMHBs have been reluctant to allow amendments after the lapse of the thirty-day “grace period.”<sup>104</sup>

### 5. Prehearing Orders

After a petition for review is filed, the GMHB typically sets a

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96-2-0029, Order on Motion (Nov. 27, 1996).

98. See WASH. ADMIN. CODE § 242-02-230(1) (1999).

99. See WASH. ADMIN. CODE § 242-02-230(2) (1999).

100. See *Taxpayers for Responsible Government v. City of Oak Harbor*, WWGMHB No. 97-2-0061, Order Denying Dismissal (Dec. 1997).

101. See *Sky Valley v. Snohomish County*, CPSGMHB No. 95-3-0068c, Order on Dispositive Motions (Jan. 9, 1996) (failure to properly serve county auditor); *Salisbury v. City of Bonney Lake*, CPSGMHB No. 95-3-0058, Order Granting Bonney Lake’s Motion to Dismiss (Oct. 27, 1995) (failure to properly serve city officials).

102. See WASH. ADMIN. CODE § 242-02-260(1) (1999). The GMHBs have not addressed the issue of whether this provision, which is not based on any provision of the GMA, may be used to impermissibly extend the 60-day limitation on challenging local government enactments. See WASH. REV. CODE § 36.70A.290(2).

103. WASH. ADMIN. CODE § 242-02-260(2) (1999).

104. See, e.g., *Friends of Fennel Creek v. City of Bonney Lake*, CPSGMHB No. 97-3-0005, Order on Motions (Apr. 22, 1997); *Banigan v. Kitsap County*, CPSGMHB No. 96-3-0016c, Order Granting Dispositive Motion (July 29, 1996); *Taxpayers for Responsible Growth*, WWGMHB No. 96-2-0002, Order on Dispositive Motions (May 6, 1996).

prehearing conference.<sup>105</sup> At that prehearing conference, the GMHB and the parties discuss a variety of topics, including the precise statement of issues that the GMHB will be asked to resolve in the proceedings.<sup>106</sup> After the prehearing conference, a prehearing order is issued which, among other things, states the issues that will be before the GMHB.<sup>107</sup>

It is important that all parties review the statement of issues in the GMHB's prehearing order. Objections to that statement must be made within seven days after the date on the prehearing order.<sup>108</sup> The GMHBs' procedural rules require that the statement of issues controls the proceedings before the GMHBs.<sup>109</sup> Both the Western Washington and Central Puget Sound GMHBs have strictly held parties to the statement of issues in the prehearing orders.<sup>110</sup>

## 6. The Record on Review

The GMA requires that GMHB decisions be based on the record developed by the local government "and supplemented with additional information if the board determines that such additional information would be necessary or of substantial assistance to the GMHB in reaching its decision."<sup>111</sup> Although this section appears to give the GMHB authority to supplement the record, the GMHBs have been reluctant to exercise that authority in light of the deference accorded local governments under the GMA.<sup>112</sup> However, the Western Washington GMHB has allowed parties to supplement the record with documents bearing on the issue of whether a challenged ordinance should be found invalid.<sup>113</sup>

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105. See WASH. ADMIN. CODE § 242-02-550, 552 (1999).

106. See WASH. ADMIN. CODE § 242-02-550(3) (1999).

107. See WASH. ADMIN. CODE § 242-02-558(2) (1999).

108. See WASH. ADMIN. CODE § 242-02-558 (1999).

109. See *id.*

110. See *Alpine v. Kitsap County*, CPSGMHB No. 98-3-0032c, Final Decision and Order (Feb. 8, 1999); *San Juan County v. Department of Ecology*, WWGMHB No. 97-2-0002, Final Decision and Order (June 19, 1997).

111. WASH. REV. CODE § 36.70A.290(4).

112. See, e.g., *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB No. 98-3-0029, Order on Motions (Oct. 2, 1996); *C.U.S.T.E.R. Ass'n v. Whatcom County*, WWGMHB No. 96-2-0008, Final Decision and Order (Sept. 12, 1996); *Benton County Fire Protection Dist. No. 1 v. Benton County*, EWGMHB No. 94-1-0023, Final Decision and Order (Apr. 25, 1995). See also *Nielsen*, *supra* note 5, at 1330 (1993) ("[The GMHB] cannot hear testimony or review documents not heard or read by the City Council before making its decision.").

113. See *Friends of Skagit County v. Skagit County*, WWGMHB No. 97-2-0025, Compliance Hearing Order (Sept. 16, 1998).

## 7. Briefs

Under the GMHBs' procedural rules, issues that are not briefed are deemed abandoned.<sup>114</sup> The Central Puget Sound GMHB has strictly applied this rule, refusing to address issues that were either not addressed or not adequately addressed in a petitioner's brief.<sup>115</sup> The Eastern Washington and Western Washington GMHBs have also refused to address unbriefed issues.<sup>116</sup>

## 8. Compliance Proceedings

Under the GMA, a GMHB is authorized in its final order to either find the local government in compliance with GMA or find the local government out of compliance with GMA.<sup>117</sup> If the GMHB finds that the local government is out of compliance with GMA, the GMHB is required to set a date "not in excess of one hundred eighty days" by which the local government must come into compliance with the GMA.<sup>118</sup> After the date for meeting compliance standards has passed (or before that date if requested by the local government), the GMHB is required to set a compliance hearing to review the local government's compliance with the GMA.<sup>119</sup> These compliance hearings are an aspect of GMHB proceedings rife with the opportunity for procedural confusion.

### *a. Time for Issuing a Decision on Compliance*

The GMA requires that GMHBs give compliance hearings "the highest priority of business to be conducted by the board, and a finding shall be issued within forty-five days of the filing of the motion" requesting a compliance hearing.<sup>120</sup> Both the Western Washington and Central Puget Sound GMHBs originally interpreted this provision as requiring that all compliance orders be issued within forty-five days of a local government's first submission of a motion or briefing in support of a finding of compliance.<sup>121</sup> Based on amendments to the

114. See WASH. ADMIN. CODE § 242-02-570(1) (1999).

115. See *Sky Valley v. Snohomish County*, CPSGMHB No. 95-3-0068c, Final Decision and Order (Mar. 12, 1996). See also *Tulalip Tribes of Washington*, CPSGMHB No. 96-3-0029, Final Decision and Order (Jan. 8, 1997) (issues cannot be first addressed in a reply brief).

116. See *Wenatchee Valley Mall Partnership v. Douglas County*, EWGMHB No. 96-1-0009, Final Decision and Order (Dec. 10, 1996); *Whatcom Environmental Counsel v. Whatcom County*, WWGMHB No. 95-2-0071, Final Decision and Order (Dec. 20, 1995).

117. See WASH. REV. CODE § 36.70A.300(1).

118. WASH. REV. CODE § 36.70A.300(3)(b).

119. See WASH. REV. CODE § 36.70A.330(1).

120. WASH. REV. CODE § 36.70A.330(2).

121. See *Hudson v. Clallam County*, WWGMHB No. 96-2-0031, Rescission of Invalidation and Finding of Compliance (Dec. 11, 1997); *Whatcom Environmental Council v. Whatcom*

GMA, the Central Puget Sound GMHB now only applies the forty-five day limitation for issuing compliance decisions where a local government subject to a finding of noncompliance files a motion for a compliance hearing before expiration of the time allowed for compliance as established in the GMHB's order.<sup>122</sup>

*b. Scope of Compliance Review*

Another compliance issue that has created a divergence of opinion between the Western Washington and Central Puget Sound GMHBs is the appropriate scope of the GMHBs' review in compliance proceedings. Originally, both GMHBs agreed that their review of a local government's compliance with the GMA should focus solely on whether the local government has "procedurally" complied with GMA.<sup>123</sup> In other words, the GMHB reviewed only whether the local government had adopted an enactment addressing the concerns that led to a finding of noncompliance. The GMHB did not, in the context of a compliance hearing, decide whether a new enactment substantively complied with the GMA. That issue was left for future GMHB proceedings challenging the local government's new enactment.

The Central Puget Sound GMHB, however, has now modified this procedure by holding that, under certain circumstances, it will review a local government's substantive compliance with the GMA during a compliance hearing.<sup>124</sup> The Central Puget Sound GMHB listed four criteria it would consider in deciding whether to review substantive compliance during a compliance hearing: (1) the GMHB's schedule; (2) the number of parties; (3) the scope and nature of the legal issues; and (4) whether new petitions have been filed challenging the local government's enactment.<sup>125</sup>

## 9. Settlement

Settlements have not occurred very often in GMHB proceedings.

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County, CPSGMHB No. 94-2-0009, Third Compliance Order (Mar. 29, 1996); *Friends of the Law v. King County*, CPSGMHB No. 94-3-0009, Order Granting Dispositive Motion (Nov. 8, 1994).

122. See *Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039, Finding of Noncompliance (May 28, 1996); *Vashon-Maury v. King County*, CPSGMHB No. 95-3-0008, Finding of Compliance (May 24, 1996).

123. See *Wenatchee Mall Partnership v. Douglas County*, Order on Petition for Reconsideration EWGMHB No. 97-1-0003 (Mar. 20, 1997); *Friends of Skagit County v. Skagit County*, WWGMHB No. 95-2-0065, Finding of Compliance (May 16, 1996); *Friends of the Law*, CPSGMHB No. 94-3-0009 (Sept. 16, 1998).

124. See *Vashon-Maury*, CPSGMHB No. 95-3-0008 (May 24, 1996).

125. See *id.*

This is the result of the GMA requirement that GMHBs issue final orders within 180 days of the filing of a petition for review. Such a short time period for completion of proceedings apparently has not allowed adequate time to pursue negotiated resolution of GMHB challenges.

In an effort to encourage settlements, the legislature amended GMA in 1997 to allow the GMHBs to extend the 180-day time period for issuing a decision under certain circumstances where a negotiated resolution might be possible.<sup>126</sup> The GMHB can extend the 180-day period if all parties request an extension or if "an extension is requested by petitioner and respondent and the board determines that a negotiated settlement between the remaining parties could resolve significant issues in dispute."<sup>127</sup>

As the Western Washington GMHB recognized in *Abenroth v. Skagit County*,<sup>128</sup> the provision allowing extensions of time for settlement discussions is not a model of clarity. In *Abenroth*, the county and a petitioner raised certain issues in a GMHB challenge and agreed to an extension of time for resolution of those issues. A different petitioner objected to any postponement of the resolution of the issues in question, claiming that, in the consolidated proceedings before the GMHB, petitioner's consent was also required before an extension could be granted. The Western Washington GMHB disagreed, holding that in those circumstances where all petitioners did not agree to an extension of time, an extension could still be granted if requested by the respondent and the petitioner that actually filed the petition raising the issues in question. The Board also found that a negotiated settlement could resolve significant issues in dispute.

#### 10. Motions for Reconsideration

The GMHB rules permit any party to file a motion for reconsideration.<sup>129</sup> Those rules are less clear as to whether parties have a right to respond to such a motion, noting that the GMHBs "may require a party to file an answer to such a motion."<sup>130</sup> However, both the Western Washington and Central Puget Sound GMHBs have recently held that parties have a right to respond to motions for reconsideration regardless of whether the Board requests such a response.<sup>131</sup>

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126. See WASH. REV. CODE § 36.70A.300(2)(b). See also WASH. ADMIN. CODE § 242-02-560 (1999).

127. *Id.*

128. WWGMHB No. 97-2-0060c, Final Decision and Order (Jan. 23, 1998).

129. See WASH. ADMIN. CODE § 242-02-832(1) (1999).

130. *Id.*

131. See *Alpine v. Kitsap County*, CPSGMHB No. 98-2-0032c, Final Decision and Order

## V. CONCLUSION

Washington's GMA has established a new system of administrative review of local government's legislative land use planning decisions. The cornerstone of this system is the creation of three GMHBs with jurisdiction to validate or invalidate local government GMA planning decisions that are appealed to them. This new land use appeal system has given the GMHBs a large role in interpreting and applying the GMA, a role that the GMHBs have arguably expanded in their own decisions.

The procedural aspects of the GMHB's review—the scope of its jurisdiction, who has standing to appeal, the burden of proof in appeal proceedings, and others—all have important implications for the participants in the debate over the implementation of the Act. As the GMA “comes of age,” participants in the GMA debate would therefore be well advised to pay as much attention to procedural details as to substantive issues.