

**CENTRAL PUGET SOUND  
GROWTH PLANNING HEARINGS BOARD  
STATE OF WASHINGTON**

JAMES C. TRACY )  
 )  
 ) Petitioner, )  
 )  
 ) v. )  
 )  
 ) CITY OF MERCER ISLAND )  
 )  
 ) Respondent. )  
 )  
 )

NO. 92-3-0001

**FINAL DECISION AND ORDER**

**A. PROCEDURAL HISTORY OF THE CASE**

On February 24, 1992, the Mercer Island City Council passed an interim critical areas regulation ordinance, No. A-96 ( the Ordinance). It was published on March 11, 1992. James Charles Tracy (Tracy), the Petitioner in this case, submitted a letter by FAX to Michael McCormick of the Growth Management Division of the Washington State Department of Community Development (DCD) on April 24, 1992. Tracy indicated his desire to file an appeal regarding the Ordinance with the growth planning hearings boards once they were created. In late April, 1992, Governor Booth Gardner appointed the initial nine members to the three growth planning hearings boards created by RCW 36.70A.250. The board members' terms of office began on May 15, 1992. On June 16, 1992, the three growth planning hearings boards jointly adopted emergency rules of practice and procedure, Chapter 242-02 WAC, as required by RCW 36.70A.270.

On June 23, 1992, upon learning of Tracy's April letter to DCD, the Central Puget Sound Growth Planning Hearings Board (the Board) advised Tracy that it had adopted emergency rules of practice and procedure, and if he wished to further pursue his appeal of the Mercer Island Ordinance, he would have to file a petition for review consistent with the requirements of WAC 242-02-210.

Tracy filed a Petition for Review with the Board on August 14, 1992. On August 20, 1992, the Board's Presiding Officer in this case, M. Peter Philley, sent a letter to the parties in compliance with RCW 36.70A.290(3). The parties were notified that the hearing on the Petition for Review would be held on November 9, 1992.

1 The Board held a prehearing conference in this case on September 21, 1992. A Prehearing  
2 Order was entered on September 23, 1992. A portion of the Prehearing Order granted the  
oral request of Respondent, the City of Mercer Island (Mercer Island), to reschedule the  
hearing date. The hearing was reset to November 2, 1992.

3 A stipulated List of Exhibits was filed by Mercer Island on September 25, 1992. It listed  
4 eight exhibits for the Board's review.

5 On October 8, 1992, the Board held a hearing on Mercer Island's motion to dismiss which  
6 had been filed on September 25, 1992. Mercer Island alleged that Tracy failed to file a  
sufficiently detailed statement of issues in his Petition for Review. The Board issued an  
7 Order Denying Respondent's Motion to Dismiss on October 12, 1992.

8 On October 14, 1992, the three growth planning hearings boards met in Seattle to jointly  
9 adopt permanent rules of practice and procedure. These final rules were filed with the  
Washington State Code Reviser's office on October 15, 1992 and became effective  
10 immediately. The permanent rules controlled for the duration of the case.

11 The hearing on the merits of the Petition for Review was held on November 2, 1992, in  
12 the Mercer Island City Council Chambers. Court reporting services were provided by  
Janet Neer of Robert H. Lewis & Associates. Present were the Board's three members:  
13 M. Peter Phillely, Joe Tovar and Chris Smith Towne. James Charles Tracy appeared *pro*  
14 *se*. Mercer Island was represented by Ronald C. Dickinson, City Attorney. Tracy called  
no witnesses to testify; Mercer Island called two witnesses, Jerry Bacon and Andrew  
Engel.

15 At the conclusion of the hearing, the Presiding Officer orally ordered Mercer Island to  
16 supplement the record with all documents that indicated what type of public notice and  
public participation took place prior to the adoption of Ordinance A-96. Mercer Island  
17 submitted Exhibits 9 through 34 on November 9, 1992.

18 Having reviewed Exhibits 1 through 34, the prehearing briefs submitted by both parties,  
19 and the file in this case, and having heard the testimony of Mr. Bacon and Mr. Engel and  
the arguments of counsel, the Board makes the following:

20  
21 **B. FINDINGS OF FACT**

22 1. On May 15, 1991, the Mercer Island Planning Commission held a public meeting. City  
23 staff members presented the Growth Management Work Program, assumptions, and  
structure for the "Critical Lands Policy". Staff discussed possible ideas for meeting the  
24 public process requirements of the Growth Management Act (GMA). {Exhibit 2}.

1 2. On June 12, 1991, the Mercer Island Planning Commission held a public meeting. City  
staff and consultants provided technical information and the Commission discussed the  
staff's recommended Goals for Interim Regulations. {Exhibit 2}.

2 3. On June 19, 1991, the Mercer Island Planning Commission held a public meeting.  
3 Staff presented proposed criteria for aquifer recharge areas and geologic hazard areas and  
4 a proposed matrix format for the regulations. A report was presented on the work of the  
5 consultants and the Commission engaged in discussion of methods for public involvement.  
{Exhibit 2}.

6 4. On July 3, 1991, the Mercer Island Planning Commission held a public meeting. Staff  
7 presented a new critical areas work program schedule and invited the Planning  
8 Commission members to attend the July 8 City Council meeting to hear a presentation on  
City Council priorities. {Exhibit 2}.

9 5. On July 31, 1991, a meeting announcement appeared in the *Mercer Island Reporter*,  
10 page A6, stating that the Planning Commission would meet on 8-8-91 to discuss  
geological hazardous areas. {Exhibit 9}.

11 6. On August 14, 1991, a newspaper article appeared on the front page of the *Mercer*  
12 *Island Reporter*, discussing the City's work on the GMA and quoting city staff members  
and island residents. The article pointed out that the critical areas regulations were then  
13 under consideration and gave the dates of upcoming Planning Commission hearings where  
the public was invited to comment. {Exhibit 10}.

14 7. On August 21 and August 28, 1991, announcements were published in the *Mercer*  
15 *Island Reporter*, stating that the next regular meeting of the Planning Commission was to  
16 be held on September 4, 1991, on the subject of passive open space designation. {Exhibits  
17 11 and 12}.

18 8. On October 8, 1991, a Mercer Island Critical Area Issues Paper was published. This  
19 95 page document included background about the GMA, Mercer Island's approach to  
critical area classification, definitions and inventories of endangered and threatened plant  
20 and animal species. {Exhibit 1}.

21 9. On November 6, 1991, an article appeared in the *Mercer Island Reporter*, describing  
the progress and issues involved in the City's compliance with the GMA. Several city staff  
22 members and Mr. Tracy were quoted in the article. {Exhibit 16}.

23 10. On November 6, 1991, the Mercer Island Planning Commission held a work session  
with the City Council. A presentation was made on the subject of critical areas by  
24 consultant and staff. City Council and Commission members asked questions of  
clarification, although little direction to staff about desired revisions was reported in the  
25 minutes. The Planning Commission then held a public hearing on the proposed critical  
26

1 areas ordinance and subsequently voted to recommend that the City request an extension  
2 of the deadline imposed by the GMA. {Exhibit 2}.

3 11. On November 20, 1992, the Mercer Island Planning Commission held a public  
4 meeting, at which time they passed a motion "to extend the deadline date for interim  
5 regulations for December 4, 1991."(sic) {Exhibit 2}.

6 12. On December 4, 1991, the Mercer Island Planning Commission conducted a  
7 continuation of the public hearing on the proposed critical areas regulations. {Exhibit 21}.

8 13. On December 6, 1991, Mercer Island's Responsible Official issued a Determination  
9 of Non-Significance (DNS) for the "Proposed Interim Critical Areas Regulations Per  
10 Growth Management Requirements". The DNS was signed by Anna Rabago, Principal  
11 Planner in the Department of Development Services for Mercer Island. The DNS includes  
12 a statement that "there is no comment period on this DNS" and that "This DNS ... may be  
13 appealed to the City Council pursuant to Section 17.80.200 of the Mercer Island Zoning  
14 Code, Appendix 6, Environmental Procedures Code. Such an appeal must be  
15 consolidated with any appeal on the City's underlying permit action. Please contact the  
16 Responsible Official for further information." {Exhibit 4}.

17 14. On January 22, 1992, Mercer Island published in the *Mercer Island Reporter* a notice  
18 of a public hearing by the Planning Commission scheduled for February 5, 1992, on the  
19 subject of the proposed critical areas regulations. {Exhibit 22}.

20 15. On February 5, 1992, the Mercer Island Planning Commission held a public hearing  
21 on the proposed critical areas regulations. Testimony was taken from sixteen citizens,  
22 both in opposition and in support. After accepting public testimony, the Commission  
23 closed the public hearing and passed a motion 6-0 to recommend to the City Council that  
24 the interim critical areas regulations be adopted. {Exhibit 2}.

25 16. On February 20, 1992, the Mercer Island City staff conducted an open house to  
26 explain the proposed critical areas regulations to the public. {Exhibit 2}.

27 17. On February 24, 1992, the Mercer Island City Council conducted a public meeting  
and took testimony from city staff and from citizens. {Exhibit 5}. They subsequently  
adopted the Critical Areas Ordinance, No. A-96. {Exhibit 6}.

18. On March 11, 1992, Mercer Island published notice of the adoption of the Critical  
Areas Ordinance, No. A-96. {Exhibit 6}.

**C. STATEMENT OF ISSUES, DISCUSSION AND CONCLUSIONS OF LAW**

**Issue No. 1**

1. Is Mercer Island Ordinance No. A-96 a development regulation as required by RCW 36.70A.060 of the Growth Management Act?

**Discussion of Issue No. 1**

Mercer Island Ordinance No. A-96 {Exhibit 6} is titled:

An ordinance of the City of Mercer Island, Washington adopting interim critical areas regulations in accordance with the provisions of the Washington State Growth Management Act, Chapter 36.70A RCW and amending city code title 19 by the addition of a new chapter 19.10 thereto entitled "Environmentally Sensitive Areas.". (emphasis added).

Development regulations are generically defined as follows by RCW 36.70A.030:

(7) "Development regulations" means any controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances. (emphasis added).

Although a liberal interpretation of the GMA's definition of "development regulation" would lead to virtually every land use enactment being classified as such a regulation, the GMA requires only two specific types of development regulations to be enacted by local governments. The first, discussed at RCW 36.70A.060, involves development regulations enacted prior to adoption of comprehensive plans. The section is entitled, "Natural resource lands and critical areas--Development regulations"<sup>1</sup>. The subsections relevant to this appeal provide as follows:

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

<sup>1</sup> WAC 365-190-040, a part of DCD's Minimum Guidelines, refers to development regulations required by RCW 36.70A.060 as "interim regulations" .

1           (3) Such counties and cities shall review these designations and development  
2 regulations when adopting their comprehensive plans under RCW 36.70A.040 and  
3 implementing development regulations under RCW 36.70A.120 and may alter  
4 such designations and development regulations to insure consistency.... [1991 1st  
5 sp.s. c 32 § 21; 1990 1st ex.s. c 17 § 6.] (emphasis added).

6           The second type of development regulation required by the GMA is specified in RCW  
7 36.70A.120, entitled, "Development regulations and capital plans--Implementation in  
8 conformity with comprehensive plan". It provides:

9           Within one year of the adoption of its comprehensive plan, each county and city  
10 that is required or chooses to plan under RCW 36.70A.040 shall enact  
11 development regulations that are consistent with and implement the comprehensive  
12 plan. These counties and cities shall perform their activities and make capital  
13 budget decisions in conformity with their comprehensive plans. [1990 1st ex.s. c  
14 17 § 12.] (emphasis added).

15           This type of development regulation is anticipated for enactment after adoption of a  
16 comprehensive plan. Therefore, it is frequently referred to as an "implementing  
17 regulation" (see the bolded language above in RCW 36.70A.060(3)).

18           Both prehearing briefs submitted to the Board prior to the formal hearing in this case  
19 agreed that Mercer Island's Ordinance was enacted in response to the requirement of  
20 RCW 36.70A.060, i.e., it was an "interim development regulation." Both parties also  
21 orally stipulated to this conclusion at the beginning of the hearing in this case.

22           Although the Ordinance refers to the GMA only by reference to Chapter 36.70A RCW  
23 generally, and not to RCW 36.70A.060 specifically, it is nonetheless clear that the  
24 Ordinance was enacted pursuant to RCW 36.70A.060. As indicated above, the Ordinance  
25 specifically refers to Interim Critical Areas Regulations in its caption. In addition, an  
26 examination of the legislative findings by the Mercer Island City Council reveals this  
27 intent. The first finding of the Ordinance provides:

          WHEREAS, the City of Mercer Island is required by the Washington State  
          Growth Management Act, Chapter 36.70A RCW to adopt interim development  
          regulations which preclude land uses or development that are incompatible with  
          critical areas which are required to be designated by the Growth Management Act;  
          (emphasis added).

          The fourth finding indicates:

          WHEREAS, the City Planning Commission has recommended to the City Council  
          the adoption of an ordinance providing for interim critical area regulations;  
          (emphasis added).

1 The fifth legislative finding specifies:

2 WHEREAS, the City Council has conducted a public meeting and received public  
3 testimony concerning the proposed designation of critical areas and the adoption  
4 of interim critical area regulations; (emphasis added).

5 The sixth finding also states:

6 WHEREAS, the City Council has determined that it is in the best interests of the  
7 citizens of Mercer Island that an ordinance be adopted in accordance with the  
8 requirements of the Washington State Growth Management Act for the  
9 designation of critical areas and the adoption of interim critical areas regulations...  
10 (emphasis added).

11 Finally, Mercer Island City Code (MICC) 19.10.020 indicates that:

12 The interim CRITICAL AREAS REGULATIONS, including Performance  
13 Standards for all Development, Criteria for Designation of Critical Areas,  
14 definitions for critical areas, and other General Requirements, which are contained  
15 in the chart/matrix which is attached hereto as Exhibit 1 and incorporated herein by  
16 reference is hereby adopted as the City of Mercer Island's Interim CRITICAL  
17 AREAS REGULATIONS pursuant to the requirements of the Washington State  
18 Growth Management Act, Chapter 36.70A RCW... (emphasis in original).

#### 19 Conclusion of Law No. 1

20 The City of Mercer Island's Ordinance No. A-96 is a critical areas development regulation  
21 as required by RCW 36.70A.060(2).

#### 22 Issue No. 2

23 Does the Central Puget Sound Growth Planning Hearings Board have jurisdiction to  
24 determine whether a development regulation adopted pursuant to RCW 36.70A.060 is in  
25 compliance with the Growth Management Act?

#### 26 Discussion of Issue No. 2

27 RCW 36.70A.280, entitled "Matters subject to board review", is the determinative statute  
for a growth planning hearings board's subject matter jurisdiction. It provides:

(1) A growth planning hearings board shall hear and determine only those  
petitions alleging either: (a) That a state agency, county, or city is not in

1 compliance with the requirements of this chapter, or chapter 43.21C RCW as it  
2 relates to plans, regulations, and amendments thereto, adopted under RCW  
3 36.70A.040; or (b) that the twenty-year growth management planning population  
4 projections adopted by the office of financial management pursuant to RCW  
5 43.62.035 should be adjusted. (emphasis added).

6 The threshold question raised by this issue can only be answered in the affirmative -- this  
7 Board does have jurisdiction to review Mercer Island's Ordinance for compliance with the  
8 GMA. RCW 36.70A.060 mandates that cities and counties adopt development  
9 regulations that protect critical areas. The language "this chapter" in RCW 36.70A.280 is  
10 referring to the GMA, which is chiefly codified in Chapter 36.70A RCW. Since the  
11 requirement of RCW 36.70A.060 is within the GMA, the Mercer Island Ordinance falls  
12 within the purview of the RCW 36.70A.280 language that a growth planning hearings  
13 board has jurisdiction to decide whether a local government's actions are in "compliance  
14 with the requirements of this chapter."

### 15 Conclusion of Law No. 2

16 The Central Puget Sound Growth Planning Hearings Board has jurisdiction to determine  
17 whether a development regulation adopted pursuant to RCW 36.70A.060 is in compliance  
18 with the Growth Management Act.

### 19 Issue No. 3

20 Does the Growth Management Act establish public participation requirements separate  
21 from the State Environmental Policy Act?

### 22 Discussion of Issue No. 3

#### 23 a. SEPA

24 The State Environmental Policy Act (SEPA), unlike the GMA, has no specific public  
25 participation requirements set forth in a unique section of the act. Instead, SEPA focuses  
26 on a public notice process that implies that public participation will occur. RCW  
27 43.21C.080, entitled "Notice of action by governmental agency---How publicized---Form---  
--Time limitation for commencing challenge to action", indicates:

(1) Notice of any action taken by a governmental agency may be publicized by  
the acting governmental agency, the applicant for, or the proponent of such  
action... (emphasis added).

1 RCW 43.21C.080(1) is clearly a public notice rather than a public "participation"  
2 provision. Furthermore, it is merely a discretionary procedure as indicated both by the use  
3 of the verb "may" and by RCW 43.21C.075(5), which provides:

4 RCW 43.21C.080 establishes an optional "notice of action" procedure which, if  
5 used, imposes a time period for appealing decisions under this chapter.... (emphasis  
6 added).

7 The SEPA Rules provide somewhat more detail about public participation in the SEPA  
8 process. WAC 197-11-030 sets out the policies of SEPA. Subsection (2)(f) requires  
9 agencies to the fullest extent possible to:

10 Encourage public involvement in decisions that significantly affect environmental  
11 quality. (emphasis added).

12 Despite the greater level of detail portrayed in the SEPA Rules than in SEPA itself (see  
13 WAC 197-11-502 and -535), the process basically remains discretionary. For instance,  
14 although WAC 197-11-502(6) does discuss public hearings and meetings, the need for  
15 such a meeting is optional. ("Public hearings or meetings may be held..."). WAC 197-11-  
16 502(11) again reveals the discretionary nature of the process. ("... agencies may use any  
17 other reasonable methods to inform ... the public that ... hearings will occur."). The  
18 optional nature of the SEPA public participation process is highlighted by WAC 197-11-  
19 510. It indicates:

20 (1) When these rules require notice to be given under this section, the lead  
21 agency must use reasonable methods to inform the public and other agencies  
22 that an environmental document is being prepared or is available and that  
23 public hearing(s), if any, will be held. The agency may use its existing notice  
24 procedures. (emphasis added).

25 In instances where a determination of significance is reached, an "expanded scoping"  
26 process can be implemented. (see WAC 197-11-410.) However, even this process is  
27 optional and did not apply in this case because a determination of nonsignificance (DNS)  
was issued. Finally, although though WAC 197-11-535(2) imposes a requirement for a  
public hearing, it does so only if specific requests are made or if the lead agency itself  
determines that such a hearing would be useful. Nothing in the record indicates that an  
optional public hearing pursuant to WAC 197-11-535(2) was held on the lead agency's  
issuance of a DNS nor did Tracy claim that such a hearing was necessary.

b. GMA

1 What are the GMA's public participation requirements? The words "public participation"  
2 are found only in three places in the GMA.<sup>2</sup> First, RCW 36.70A.070, entitled  
3 "Comprehensive plans -- Mandatory elements", provides:

4 ... A comprehensive plan shall be adopted and amended with public participation as  
5 provided in RCW 36.70A.140.... (emphasis added).

6 The other two references to the phrase are located in RCW 36.70A.140, entitled  
7 "Comprehensive plans -- Ensure public participation." It provides:

8 Each county and city that is required or chooses to plan under RCW 36.70A.040  
9 shall establish procedures providing for early and continuous public participation in  
10 the development and amendment of comprehensive land use plans and  
11 development regulations implementing such plans. The procedures shall provide  
12 for broad dissemination of proposals and alternatives, opportunity for written  
13 comments, public meetings after effective notice, provision for open discussion,  
14 communication programs, information services, and consideration of and response  
15 to public comments. Errors in exact compliance with the established procedures  
16 shall not render the comprehensive land use plan or development regulations  
17 invalid if the spirit of the procedures is observed. (emphasis added).

18  
19 <sup>2</sup> The Board is aware that the phrase "citizen participation", as opposed to "public" participation, is used  
20 within the GMA. RCW 36.70A.020, entitled "Planning goals", provides as follows:

21 The following goals are adopted to guide the development and adoption of comprehensive  
22 plans and development regulations of those counties and cities that are required or choose to plan  
23 under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used  
24 exclusively for the purpose of guiding the development of comprehensive plans and development  
25 regulations:

26 ...  
27 (11) Citizen participation and coordination. Encourage the involvement of citizens in the  
planning process and ensure coordination between communities and jurisdictions to reconcile  
conflicts. (emphasis added).

Secondly, RCW 36.70A.190(6) provides that DCD:

... shall provide planning grants to enhance citizen participation under RCW 36.70A.140.  
(emphasis added).

Since the phrase "citizen participation" is used only twice in the GMA, at RCW 36.70A.020(11) and in  
RCW 36.70A.190(6), and since the latter specifically cites to the public participation requirements of  
RCW 36.70A.140, the Board determines that the terms "citizen" and "public" participation are  
synonymous; the citizen participation referenced in the planning goals of RCW 36.70A.020(11) is  
referring to the enhanced public participation procedures outlined in RCW 36.70A.140.

1 The Board generally treats the use of the verb "shall" as creating a mandatory duty. (see  
2 Order Denying Motion for Continuance beyond 180-Day Limit entered in *City of*  
3 *Snoqualmie and City of Issaquah v. King County*, CPSGPHB Case No. 92-3-0005 and  
4 the cases cited in that order). RCW 36.70A.140 imposes mandatory requirements upon  
5 cities and counties planning under the GMA in requiring that they "shall" establish  
6 procedures providing for early and continuous public participation procedures. Because  
7 they are mandatory, the GMA's public participation requirements are separate from those  
8 suggested in SEPA.

#### 9 Conclusion of Law No. 3

10 The Growth Management Act establishes public participation requirements separate from  
11 the State Environmental Policy Act.

#### 12 Issue No. 4

13 Does the Growth Management Act impose public participation requirements for the  
14 adoption of development regulations required by RCW 36.70A.060?

#### 15 Discussion of Issue No. 4

16 The heart of the GMA's public participation requirements is clearly RCW 36.70A.140.  
17 This provision mandates that local governments planning under the GMA establish  
18 procedures for early and continuous public participation in addition to any other existing  
19 statutory requirements for public participation. It is crucial to note that this "enhanced"  
20 public participation requirement applies only to "... comprehensive land use plans and  
21 development regulations implementing such plans". As previously discussed, two types of  
22 development regulations exist: "interim" development regulations required by RCW  
23 36.70A.060 and "implementing" development regulations required by RCW 36.70A.120.  
24 RCW 36.70A.140 refers only to the latter -- implementing development regulations. If the  
25 legislature intended the public participation requirements of RCW 36.70A.140 to apply to  
26 RCW 36.70A.060's "interim" development regulations, it would have required it by  
27 referring to development regulations generically or by referencing both types of required  
development regulations rather than just implementing ones. Therefore, Mercer Island  
was not required to comply with the enhanced public participation requirements of RCW  
36.70A.140 when it formulated and adopted its interim development regulations pursuant  
to RCW 36.70A.060.<sup>3</sup>

<sup>3</sup> The Board recognizes that WAC 365-190-040(2)(a) discusses public participation requirements.  
However, DCD's Minimum Guidelines are only advisory -- they are not mandatory. RCW 36.70A.170(2)  
directs that cities and counties "consider" the guidelines; they are not bound to follow them. This  
interpretation is consistent with DCD's own explanation: WAC 365-190-020 specifies only that the  
minimum guidelines "... shall be considered by counties and cities in designating these lands".

1 Sound policy reasons exist for the legislature to have enacted RCW 36.70A.140 in the  
2 manner that it was adopted. The provisions of the GMA initially enacted in 1990 became  
3 effective on July 1, 1990. The requirement for cities and counties to adopt interim critical  
4 areas development regulations, codified as RCW 36.70A.060, was a part of the original  
5 GMA. (see 1990 1st ex.s. c 17 § 6). It required counties and cities to adopt interim  
6 development regulations by September 1, 1991. This gave local jurisdictions a little over  
7 one year to adopt the interim regulations. With passage of the 1991 amendments to the  
8 GMA, DCD was authorized to extend the compliance deadline, following a local  
9 government's request, for up to one hundred eighty days (RCW 36.70A.380). A  
10 maximum extension would set a deadline for adopting interim critical areas development  
11 regulations to March 1, 1992. An additional planning document was also mandated by the  
12 1991 legislature. County-wide planning policies were required to be adopted by July 1,  
13 1992, pursuant to RCW 36.70A.210. Despite the possibility of a time extension and the  
14 addition of the requirement for adopting county-wide planning policies, the deadline for  
15 adopting a comprehensive plan was not changed. RCW 36.70A.040 has always required  
16 adoption of comprehensive plans by July 1, 1993.

17 The legislature was fully aware that comprehensive plans had to be adopted a little over a  
18 year after the deadline for adopting interim development regulations. The crucial language  
19 of RCW 36.70A.140, " ... procedures providing for early and continuous public  
20 participation in the development and amendment of comprehensive land use plans and  
21 development regulations implementing such plans" was not altered in 1991; the original  
22 language remained the same despite the addition of the time extension and county-wide  
23 planning policy sections to the GMA in 1991. Certainly, the legislature had the  
24 opportunity to amend RCW 36.70A.140 if it felt that public participation was more critical  
25 once the deadlines for adopting interim development regulations had been delayed.

26 The legislature's GMA scheme requires enhanced public participation for the development  
27 of comprehensive plans and implementing development regulations. Since the legislature  
directed cities and counties to review their interim critical areas development regulations  
at the time of adoption of their comprehensive plans, the legislature knew that the interim  
regulations would ultimately come under the enhanced public participation requirements  
of RCW 36.70A.140.

This does not mean that local government can ignore the public in adopting interim  
development regulations. To the contrary, cities and counties must comply with other  
statutory requirements and local ordinances already in place regarding public participation  
and notice. The Board's conclusion that the GMA's enhanced public participation  
requirements do not apply to interim development regulations does not prevent local  
jurisdictions from implementing such procedures at the earliest possible point of the GMA  
process. Likewise, because of the language of RCW 36.70A.140, this Board will closely

1 scrutinize the level of public participation afforded to members of the public during the  
2 comprehensive plan and implementing development regulation phases of GMA  
implementation, when it hears petitions for review involving these later actions if public  
participation is at issue.

3 In particular, the Board expects that the procedures for enhanced public participation  
4 required by RCW 36.70A.140 will be adopted by the legislative body of each jurisdiction  
5 planning under the GMA. The simplest way to adopt these procedures would be as either  
6 a motion or resolution, but in any case they should be in concise written form and  
7 effectively communicated to individual citizens as well as interest groups. The specific  
8 content of locally adopted procedures will vary depending on local circumstances or other  
9 pre-existing methods of public involvement. Different techniques may also be more  
appropriate at different phases in the development of plans and implementing regulations.  
However, the procedures listed should include specific actions that can be documented  
and quantified (e.g., numbers of public mailings, surveys or workshops) rather than just  
statements of intent (e.g., the city seeks to involve interested citizens and groups).

10 These enhanced public participation procedures may include public involvement  
11 procedures or techniques required by other statutes or local ordinances. However, it is  
12 important to acknowledge that the methods required by SEPA, for example, fall far short  
13 of "enhanced" public participation for two reasons. First, SEPA procedures for public  
14 involvement are largely discretionary. Second, SEPA focuses on notice of specific  
proposals rather than on actively engaging the public in considering a wide range of  
options at the most seminal level of policy making.

#### 15 Conclusion of Law No. 4

16 The Growth Management Act's enhanced public participation requirements, as specified in  
17 RCW 36.70A.140, do not apply to the process for adopting development regulations  
18 pursuant to RCW 36.70A.060. Therefore, the City of Mercer Island was not required to  
comply with those provisions in adopting Ordinance No. A-96.

#### 19 Issue No. 5

20 Does the Central Puget Sound Growth Planning Hearings Board have jurisdiction to  
21 determine whether the City of Mercer Island complied with the requirements of the State  
22 Environmental Policy Act, Chapter 43.21C RCW, in adopting its critical areas  
23 development regulations?

#### 24 Discussion of Issue No. 5

25 This issue questions the extent of the Board's jurisdiction to review local agency actions  
26 under the State Environmental Policy Act (SEPA). As previously indicated, RCW

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36.70A.280(1) is the principal section of the GMA for determining the extent of the Board's subject matter jurisdiction. It provides:

(1) A growth planning hearings board shall hear and determine only those petitions alleging either: (a) That a state agency, county, or city is not in compliance with the requirements of this chapter, or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040; or (b) that the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted. (emphasis added).

Clearly, the Board has SEPA jurisdiction if the challenged underlying governmental action involves specified documents mandated by the GMA. In order to determine precisely which documents ("plans, regulations and amendments thereto...") the GMA is referring to, one must turn to RCW 36.70A.040. Entitled, "Who must plan", it provides in part:

(1) Each county that has both a population of fifty thousand or more and has had its population increase by more than ten percent in the previous ten years, and the cities located within such county, and any other county regardless of its population that has had its population increase by more than twenty percent in the previous ten years, and the cities located within such county, **shall adopt comprehensive land use plans and development regulations under this chapter...** (emphasis added).

It is important to note that the reference to "development regulations" in RCW 36.70A.040 is generic; it does not contain modifying language that identifies which specific type of GMA development regulation is being discussed. In sharp contrast, other provisions in the GMA provide modifying language that clearly identifies which type of development regulation is being discussed. For instance, RCW 36.70A.060(1) mentions development regulations "to assure the conservation of agricultural, forest, and mineral resource lands..."; RCW 36.70A.060(2) cites to "development regulations that protect critical areas..."; RCW 36.70A.060(2) discusses "implementing development regulations" and RCW 36.70A.120 refers to "development regulations that ... implement the comprehensive plan..." Therefore, when the GMA simply refers to "development regulations" alone, without any indication as to which specific type of development regulation is being discussed, the Board holds that the term is referring to all types including interim development regulations required by RCW 36.70A.060 and the implementing development regulations of RCW 36.70A.120.

Having concluded that the reference in RCW 36.70A.040 to "development regulations" includes interim development regulations (as well as implementing development regulations), it is then logical for the Board to also conclude that it has SEPA jurisdiction over such regulations. Again, RCW 36.70A.280(1) grants SEPA jurisdiction to the Board over petitions alleging that a state agency, city or county has failed to comply with SEPA

1 as it "... relates to plans, regulations, and amendments thereto adopted under RCW  
2 36.70A.040..." Since an interim development regulation is a specific example of a  
3 "regulation ... adopted under RCW 36.70A.040" this Board has jurisdiction to review a  
4 local action in adopting an interim development regulation for compliance with SEPA.

5 This holding is consistent with the legislature's intent. Since this Board serves in a quasi-  
6 judicial capacity, it is charged with interpreting legislative language. Statutory  
7 construction that leads to unlikely, absurd or strained consequences should be avoided.  
8 *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d. 314 (1992). It would be absurd to  
9 interpret RCW 36.70A.280(1) to mean that a growth planning hearings board has SEPA  
10 jurisdiction only for appeals of comprehensive plans and implementing development  
11 regulations, and that only a superior court has SEPA jurisdiction over a GMA-mandated  
12 interim development regulation. Such a conclusion would completely defeat the  
13 legislature's intent to provide a speedy dispute resolution process (for example, see RCW  
14 36.70A.290(3), RCW 36.70A.300 and RCW 36.70A.800(3)).

15 Furthermore, SEPA itself strives to avoid such a bifurcation. RCW 43.21C.075 provides:

16 (1) Because a major purpose of this chapter is to combine environmental  
17 considerations with public decisions, any appeal brought under this chapter shall be  
18 linked to a specific governmental action. The State Environmental Policy Act  
19 provides a basis for challenging whether governmental action is in compliance with  
20 the substantive and procedural provisions of this chapter. The State  
21 Environmental Policy Act is not intended to create a cause of action unrelated to a  
22 specific governmental action. (emphasis added).

23 SEPA creates no express mechanism for appeal; rather, it overlays and supplements  
24 existing authority. *Hollywood Hills Citizens v. King County*, 33 Wn. App. 169, 173, 653  
25 P.2d 1324 (1982), reversed on other grounds at 101 Wn.2d 68, 677 P.2d 114 (1984)  
26 citing *Department of Natural Resources v. Thurston County*, 92 Wn.2d 656, 601 P.2d 494  
27 (1979); *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978).

Thus, SEPA claims are brought within the confines of whatever statutory  
framework is provided for challenging the particular government action in  
question. *Hollywood Hills*, at 173.

In this case, the specific governmental action is Mercer Island's adoption of an interim  
development regulation pursuant to the GMA. The related SEPA analysis must be linked  
to the GMA review of the Mercer Island Ordinance over which the Board clearly has  
jurisdiction.

Conclusion of Law No. 5

1 The Central Puget Sound Growth Planning Hearings Board has jurisdiction to determine  
2 whether the City of Mercer Island complied with the requirements of the State  
3 Environmental Policy Act, Chapter 43.21C RCW, in adopting its critical areas  
4 development regulations.

Issue No. 6

5  
6 Was the City of Mercer Island's notice of its determination of nonsignificance, issued  
7 pursuant to SEPA, misleading?

Discussion of Issue No. 6

8  
9 Tracy argues that Mercer Island violated SEPA by adopting an "incomplete, inaccurate,  
10 and misleading Declaration of Non-Significance" that prevented the public from  
11 understanding the contents of the proposed ordinance.

12 Mercer Island issued a Determination of Non-Significance (DNS) on December 6, 1991,  
13 that contained the following "description of proposal"<sup>4</sup>:

14 Proposed interim critical areas regulations per growth management requirements.  
15 {Exhibit 3}.

16 Tracy claims that the public was misled by this notice because it did not inform them that  
17 certain components of the proposed ordinance were not "per growth management  
18 requirements" (i.e., the designation of "piped watercourses" and "public and privately  
19 owned passive open space" as GMA critical areas). Accordingly, he claims that interested  
20 persons were not able to adequately prepare for the public hearing. He asks the Board to  
21 invalidate the entire Ordinance because of this. [see Petitioner's Prehearing Brief, pp. 10-  
22 12]. Tracy's argument is not one of first impression in this state.

23 The Washington Supreme Court has indicated that "the purpose of notice statutes is to  
24 apprise fairly and sufficiently those who may be affected of the nature and character of an  
25 action so they may intelligently prepare for the hearing." *Nisqually Delta Association v.*  
26 *DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985); *Barrie v. Kitsap County*, 84 Wn.2d  
27 579, 585, 527 P.2d 1377 (1974). If public notice fails to fairly apprise the reader of  
actions that will be taken at the meeting, the concept of notice would be a "meaningless

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<sup>4</sup> Mercer Island's Environmental Checklist indicated that the title of the proposed action was:

Interim critical areas regulations as set forth under the relevant provisions of the state Growth  
Management Act. {Exhibit 3}

1 exercise". *Port of Edmonds v. Fur Breeders*, 63 Wn. App. 159, 166-167, 816 P.2d 1268  
2 (1991) (review denied) 118 Wn.2d 1021 (1992); *Department of Natural Resources v.*  
3 *Marr*, 54 Wn. App. 589, 596, 774 P.2d 1260 (1989). Notice is adequate unless the party  
4 challenging it is able to show that anyone was actually misled by the notice or unprepared  
5 for the hearing. *Nisqually Delta Association*, at 727.

6 An analogous case was decided by the Washington Supreme Court in *Glaspey & Sons,*  
7 *Inc. v. Conrad*, 83 Wn.2d 707, 521 P.2d 1173 (1974). *Glaspey & Sons, Inc.* appealed  
8 Yakima County's adoption of its first zoning ordinance. It alleged that the notice of  
9 hearing, published pursuant to RCW 36.70.590, failed to adequately state the purpose of  
10 the hearing. The notice indicated that the purpose of the hearing was for "discussing the  
11 pros and cons of a proposed Zoning Ordinance..."

12 The *Glaspey* court adopted the following rule:

13 ... statutes which require that notice be given prior to adoption or amendment of a  
14 zoning ordinance are construed as requiring that the notice reasonably apprise  
15 interested parties of the contemplated action that is pending. *Glaspey*, at 710,  
16 citing Annot., 96 A.L.R.2d 497 (1964).

17 The court concluded that Yakima County's notice failed to state the hearing's purpose.

18 Notice that the board would hold a hearing "for the purpose of discussing the pros  
19 and cons" of a proposed ordinance was insufficient. It did no more than reveal  
20 that the board intended to hear public discussion for and against it. (citation  
21 omitted). The notice did not disclose, however, the board's plan to propose  
22 substantial amendments of its own. Rather, it directed the public's attention to a  
23 specific proposed amended ordinance, said to be on file in the board's office, about  
24 which the hearing was supposed to be held. Had one gone to the board's office to  
25 study the ordinance in preparation for the hearing, as plaintiff did, no indication of  
26 contemplated changes would have been found. Yet, the board possessed two  
27 pages of amendments it planned to read into the record immediately prior to the  
hearing.

Under such circumstances, after reading the notice and the proposed ordinance  
filed in the board's office, one seeking to be an informed opponent or proponent  
would have been misled. In short, the notice was a trap. No one could have  
adequately prepared for the hearing under the circumstances before us. *Glaspey*,  
at 711. (emphasis added).

The *Glaspey* court also indicated:

... a proper hearing can be no greater protection for the public and the individual  
landowner than the opportunity afforded by the notice to take an *informed part*

1           therein. If one, whether in favor of or opposed to a zoning ordinance, is forced to  
2           attend a zoning hearing both unprepared for and uninformed about the purpose,  
3           the hearing will be a farce, despite the safeguards thrown around it. *Glaspey*, at  
4           713-714 (emphasis in original).

5           Although at first glance the actual notice given by Yakima County ("discussing the pros  
6           and cons") and that of Mercer Island ("per growth management requirements") are  
7           similarly vague, the underlying facts are significantly different. In *Glaspey* the county  
8           evidently was letting the public see one version of a proposed ordinance when, in fact, it  
9           was prepared to take action on a later version. No allegation has been made here that, had  
10          interested parties in Mercer Island gone to city hall to review the proposed interim  
11          development regulations ordinance, they would have seen anything but the version that  
12          was ultimately considered by the city council.

13          The Court of Appeals (Division I) more recently reached a similar conclusion in *Port of*  
14          *Edmonds v. Fur Breeders*, 63 Wn. App. 159, 816 P.2d 1268 (1991). The Port initiated  
15          condemnation proceedings. However, its notice failed to mention the condemnation  
16          proceedings. The court had no difficulty in finding that:

17                 ... a reasonable person would not have been fairly apprised by *The Herald* notice  
18                 that the actions of the Port Commission would include possible condemnation of  
19                 the site in question since no mention of the condemnation was made in the notice.  
20                 *Port of Edmonds*, at 167.

21          In contrast to the *Port of Edmonds* case (where no one who read the notice would have  
22          had even the slightest clue that a condemnation proceeding would be discussed), Mercer  
23          Island's notice of the issuance of a DNS did inform the reader that the determination could  
24          be appealed to the city council. Persons interested in the proposed ordinance would still  
25          have been required to obtain a copy of the proposal, scrutinize it and compare it with the  
26          requirements of the GMA in order to intelligently prepare for the city council's hearing.  
27          The fact that Mercer Island's SEPA notice failed to include reference to piped watercourse  
                provisions, which are not specified in the GMA, does not make Mercer Island's SEPA  
                notice defective. Whether the adopted regulations themselves are in compliance with the  
                GMA is another question, discussed in Issues No. 9 and 10. The present discussion  
                merely considers whether the notice of the DNS itself was misleading.

                No evidence suggests that anyone was actually misled by Mercer Island's notice. One  
                must keep in mind that the action that was the subject of the "notice" given here was the  
                issuance of a determination of nonsignificance pursuant to SEPA; it was not specific  
                notice of the city council's public hearing where public testimony would be heard. The  
                DNS was issued on December 6, 1992. The city council's public hearing on the proposed  
                ordinance did not take place until February 24, 1992.

1 The SEPA Rules encourage the preparation of SEPA documents "at the earliest possible  
2 point" in the planning process. (WAC 197-11-055(2)). The adoption of legislation,  
3 ordinances, rules or regulations that contain standards controlling use or modification of  
4 the environment (WAC 197-11-704(2)(b)(i)) or the adoption or amendment of  
5 comprehensive land use plans or zoning ordinances (WAC 197-11-704(2)(b)(ii))  
6 constitute nonproject actions. Nonproject is defined at WAC 197-11-774 to mean  
7 "actions which are different or broader than a single site specific project, such as plans,  
8 policies, and programs." Therefore, the level of detail necessary for a nonproject action is  
9 less than for a site specific action. In turn, the level of detail in a notice of a DNS is also  
10 less than with a determination of significance. Pursuant to WAC 197-11-340, a lead  
11 agency simply must prepare a DNS that is "substantially in the form provided in 197-11-  
12 970". A comparison of the DNS issued by Mercer Island and the sample form listed at  
13 WAC 197-11-970 indicates that the city substantially complied with this requirement.  
14 Note that, even if Mercer Island had issued a determination of significance that ultimately  
15 led to an environmental impact statement being issued, the city would have had "more  
16 flexibility" in preparing an EIS on a nonproject proposal. (see WAC 197-11-442(1)).

17 Although the Board has determined that Mercer Island's SEPA notice was adequate, it  
18 was only marginally so. The Board would caution against drawing a conclusion that such  
19 minimal notice will suffice for meeting either the SEPA notice requirements for the  
20 preparation of comprehensive plans and implementing development regulations pursuant  
21 to the GMA, or the public participation requirements of RCW 36.70A.140.

22 To be useful as a part of enhanced public participation, notice would have to be both  
23 better distributed and more descriptive than was the case with Mercer Island's notice of a  
24 determination of nonsignificance for its proposed critical areas regulations. Whether  
25 publication of notice is required or voluntary, notice must be sufficiently descriptive to  
26 alert a reader to the major issues at hand and the ways in which to further participate in  
27 the process. On the other hand, wholesale reproduction of the proposed ordinance is both  
unreasonable and unnecessary to serve this purpose. A summary of the major features or  
topical areas of the proposed action would be in order.

#### Conclusion of Law No. 6

The City of Mercer Island provided adequate notice when it issued its notice of a  
determination of nonsignificance pursuant to SEPA.

#### Issue No. 7

Does the Central Puget Sound Growth Planning Hearings Board have jurisdiction to  
determine whether and in what particular manner a local government has exceeded its  
authority or the requirements of the Growth Management Act in adopting its critical areas  
development regulations pursuant to RCW 36.70A.060?

Discussion of Issue No. 7

1 Tracy challenges Mercer Island's authority to enact critical areas development regulations  
2 which he alleges exceed the authority of the GMA. In addition, he seeks clarification  
3 whether potential petitioners must file simultaneous appeals, one with a growth planning  
4 hearings board for GMA issues and a second with a superior court for issues that allege  
5 that a government has exceeded the requirements of the GMA in adopting a plan or  
6 regulation under the auspices of the act. Tracy's primary concern is that potential  
7 petitioners will be left unprotected if this Board determines that it has authority only to  
8 review matters it feels are within the confines of the GMA and that issues beyond the  
9 GMA must be determined by a court of law. If this Board enters such a decision, Tracy is  
10 concerned that the statute of limitations for appealing any non-GMA required portion of  
11 an ordinance may have passed.

8 Mercer Island responds by pointing out that no provisions in the GMA explicitly prohibit a  
9 local jurisdiction from enacting regulations that exceed the requirements of the GMA.  
10 Furthermore, Mercer Island maintains that this Board does not have the jurisdiction to  
11 determine whether a city has exceeded its GMA authority.

11 The GMA authorizes the Board to determine whether an enactment by a local jurisdiction  
12 is in compliance with the requirements of the act. In so doing, the Board will necessarily  
13 consider whether a local jurisdiction planning under the GMA has exceeded the  
14 requirements of that act. We will do this by examining whatever action was taken by the  
15 local jurisdiction and comparing it to the purposes, requirements and goals of the GMA as  
16 a whole. If the local action is consistent with the requirements of the GMA, this Board  
17 will find that the local government was in compliance with the GMA. Conversely,  
18 inconsistent actions will be remanded. To reach a finding of inconsistency, the Board  
19 must determine that the presumption of validity granted local government by RCW  
20 36.70A.320 has been overcome by a preponderance of the evidence.

18 The Board will always review the entire record as it relates to the specific issues being  
19 raised by a petitioner about an enactment required by the GMA. If the local jurisdiction  
20 indicates, as did Mercer Island, that the adopted ordinance was enacted pursuant to the  
21 requirements of the GMA, this Board will review the entire document. Only if a local  
22 jurisdiction clearly specifies that certain provisions of an adopted ordinance were adopted  
23 under the authority of another act or the jurisdiction's general police powers, will this  
24 Board not accept jurisdiction to review that portion of the enactment. If it is clear that a  
25 local jurisdiction has split its ordinance into GMA and non-GMA provisions, a potential  
26 challenger will have to file more than one appeal: one with a growth planning hearings  
27 board and the other with the local superior court. This Board has jurisdiction only over  
28 matters specified in RCW 36.70A.280.

Conclusion of Law No. 7

1 The Central Puget Sound Growth Planning Hearings Board has jurisdiction to determine  
2 whether or not a local government is in compliance with the requirements of the Growth  
3 Management Act. In conducting its review of the specific enactment being challenged, the  
4 Board necessarily will decide whether the local jurisdiction has exceeded its authority or  
5 the requirements of the GMA.

Issue No. 8

6 Is the definition of "critical areas" contained in the Growth Management Act at RCW  
7 36.70A.030(5) exclusive and prescriptive?

Discussion of Issue No. 8

8  
9 Critical areas are defined at RCW 36.70A.030(5) as follows:

10  
11 "Critical areas" include the following areas and ecosystems: (a) Wetlands; (b)  
12 areas with a critical recharging effect on aquifers used for potable water; (c)  
13 fish and wildlife habitat conservation areas; (d) frequently flooded areas; and  
14 (e) geologically hazardous areas.

15 Two of the five categories of land that comprise critical areas are defined by the GMA:  
16 geologically hazardous areas at RCW 36.70A.030(9) and wetlands at RCW  
17 36.70A.030(17); the other three categories are undefined.

18 Tracy contends that the GMA's definition of critical areas is exclusive and prescriptive.  
19 He argues that, unless an area designated by Mercer Island as a critical area falls within  
20 one of the five categories of critical areas listed in RCW 36.70A.030(5), it is not a critical  
21 area required to be regulated by the GMA. Tracy's rationale is that several other  
22 definitions in RCW 36.70A.030 use the phrase "including, but not limited to" (see RCW  
23 36.70A.030(7) or "other" (see RCW 36.70A.030(9), (13) and (16)), while subsection (5)  
24 does not.

25 Mercer Island's response is that the legislative definition does not preclude a jurisdiction  
26 from addressing and including other categories as critical areas. The city points out that if  
27 the legislature intended local government to be limited to only the statutory definitions it  
would have so indicated. Mercer Island points to the legislative findings of RCW  
36.70A.010 for the proposition that development regulations which identify critical areas  
not specifically defined in the GMA but which are intended to protect those areas would  
fall within the legislature's intent that there be no threat to the public health and safety and  
that a high quality of life be promoted.

1 The Board concludes that the GMA definition of "critical areas" is not exclusive and  
2 prescriptive. Several of Mercer Island's arguments are persuasive. The Board agrees that,  
3 had the legislature intended its definition to be the only definition, it would have indicated  
4 this intent. Nothing in the definition limits local jurisdictions. Instead, the Board  
5 concludes that the GMA's definition of "critical areas" constitutes a minimum -- local  
6 jurisdictions must address the five categories described in the definition but are free to add  
7 other categories.<sup>5</sup>

8 Second, "frequently flooded areas", "areas with a critical recharging effect on aquifers  
9 used for potable water" and "fish and wildlife habitat conservation areas" are undefined in  
10 the GMA. Without further definition, it would be difficult for a local jurisdiction to adopt  
11 adequate critical area development regulations. Instead, local governments must turn to  
12 other sources for help in defining the three undefined categories of critical areas. The  
13 Board recognizes that DCD's Minimum Guidelines do define "frequently flooded areas",  
14 "habitats of local importance" (for fish and wildlife conservation areas) and "areas with a  
15 critical recharging effect on aquifers used for potable water". However, the Minimum  
16 Guidelines are simply to be considered by counties and cities -- they are not mandatory.  
17 (see RCW 36.70A.050, RCW 36.70A.170(2) and the first paragraph of WAC 365-190-  
18 020). Therefore, having considered the definitions used in the Minimum Guidelines and  
19 the GMA itself, local governments are free to utilize them or to modify them to meet their  
20 local needs.

21 Third, even the categories of critical areas that are defined by the GMA are vague or quite  
22 general in nature. It will be up to cities and counties to further define these terms in  
23 greater detail in order for them to adopt adequate critical area development regulations.

#### 24 Conclusion of Law No. 8

25 The Growth Management Act's definition of "critical areas" at RCW 36.70A.030(5) is not  
26 exclusive and prescriptive: local governments must consider, but are not bound by, that  
27 definition and the definitions used in the minimum guidelines developed by the Washington  
State Department of Community Development. Local governments also have the  
authority to modify existing definitions or adopt their own to meet local requirements as  
long as those definitions comply with the Growth Management Act.

---

28 <sup>5</sup> Although the GMA definition of "critical areas" includes five categories of critical areas, the Board's  
29 conclusion that this definition is a minimum that should be addressed by a development regulation does  
30 not mean that a local jurisdiction must have a critical areas development regulation over every specific  
31 category. It may, for instance, find that no lands exist in that jurisdiction for a category, or demonstrate  
32 that it has an adequate existing regulation for such lands.

Issue No. 9

1 Do "piped watercourses" as defined in Mercer Island's Critical Areas Ordinance constitute  
2 "critical areas" as defined in the Growth Management Act at RCW 36.70A.030(5)?

3 Discussion of Issue No. 9

4 Tracy claims that "piped watercourses", which are included in the Mercer Island  
5 Ordinance as a category of critical areas, do not fall within any of the five categories of  
6 "critical areas" defined in RCW 36.70A.030(5).

7 Although the Board has concluded that the GMA's definition of critical areas is not the  
8 exclusive definition and that therefore cities and counties have the flexibility to adapt that  
9 definition to their own needs, this Board nonetheless will review a local jurisdiction's  
10 actions to determine whether compliance with the GMA has been achieved.

11 RCW 36.70A.170, entitled "Natural resource lands and critical areas--designations",  
12 states:

13 (1) On or before September 1, 1991, each county, and each city, shall  
14 designate where appropriate:

15 ...

16 (d) Critical areas.

17 (2) In making the designations required by this section, counties and cities  
18 shall consider the guidelines established pursuant to RCW 36.70A.050.  
19 (emphasis added).

20 What does the GMA require local jurisdictions to do about those areas they have  
21 designated as critical areas? RCW 36.70A.060(2) provides that:

22 Each county and city shall adopt development regulations that protect critical areas  
23 that are required to be designated under RCW 36.70A.170. For counties and  
24 cities that are required or choose to plan under RCW 36.70A.040, such  
25 development regulations shall be adopted on or before September 1, 1991. For the  
26 remainder of the counties and cities, such development regulations shall be  
27 adopted on or before March 1, 1992. (emphasis added).

28 In compliance with these GMA requirements, Mercer Island adopted its Ordinance on  
29 February 24, 1992.<sup>6</sup> As previously noted, the Ordinance makes reference to critical areas  
30 on several occasions. It does not on its face define what constitutes a critical area in

31 <sup>6</sup> The Board presumes that Mercer Island obtained a one hundred eighty day extension of its deadline for  
32 adopting a critical areas development regulation pursuant to RCW 36.70A.380.

1 Mercer Island. Instead, the Ordinance, codified at MICC 19.10.010, refers to "sloping  
2 hillsides, wetlands, shorelands, watercourses, stream corridors, fish and wildlife habitat,  
3 publicly and privately owned passive open spaces, and environmentally sensitive lands."

4 Although the Ordinance does not contain a definitions section, MICC 19.10.030 adopts  
5 and incorporates by reference "The Field Guide to Mercer Island's Critical Areas" (Field  
6 Guide). {Exhibit 7}. Appendix C to the Field Guide is entitled "Glossary of Terms".  
7 Critical Areas are defined in it as:

8 *Geologically hazardous areas*, *watercourses*, wetlands, shorelines, and publicly  
9 and privately-owned passive open spaces. Critical Areas have measurable  
10 characteristics which, when combined, create a value for or potential risk to the  
11 public health, safety, and welfare. (emphasis added; terms in italics are further  
12 defined in the Field Guide Glossary; terms defined in the GMA are underlined).

13 Mercer Island's definition of "critical areas" is obviously not identical to the GMA's.  
14 Mercer Island includes "watercourses", "shorelines", and "publicly and privately-owned  
15 passive open spaces", categories not mentioned in the GMA, as additional critical area  
16 categories. Conversely, the Mercer Island definition does not include three GMA-defined  
17 categories of critical areas: "areas with a critical recharging effect on aquifers used for  
18 potable water", "fish and wildlife habitat conservation areas", or "frequently flooded  
19 areas". Of the five categories comprising critical areas defined by Mercer Island, two are  
20 undefined: "shorelines" and "publicly and privately-owned passive open spaces".<sup>7</sup>

21 "Watercourses", are defined in the Field Guide as follows:

22 A year-round or intermittent naturally flowing stream which exhibits the following  
23 characteristics, in part or whole: a stream or route formed by nature or modified by  
24 humans; generally consisting of a defined channel with a bed, banks, or sides for a  
25 substantial portion of its length on the lot; and watercourses which exhibit the  
26 above characteristics and have been channelized or piped. Watercourses do not  
27 include specially designed irrigation and drainage ditches, grass-lined swales,  
canals, stormwater runoff devices, or other courses unless they are used by  
salmonoids or to convey watercourses that were naturally occurring prior to  
construction. The boundary of a watercourse extends to the edge of its  
watercourse corridor.<sup>8</sup>

28 <sup>7</sup> Mercer Island does define "erosion hazard areas", "geologic hazard areas", "landslide hazard areas",  
29 "seismic hazard areas" "watercourse" and "wetlands". Of these categories, only geologically hazardous  
30 areas, watercourses and wetlands fall within the Field Guide's definition of a critical area.

31 <sup>8</sup> A "watercourse corridor" is defined as:

1 Watercourses therefore have a basic criterion: they must be a "year-round or intermittent  
2 naturally flowing stream" or such a stream modified by humans by being "channelized or  
3 piped". Tracy contends that adding "piped" watercourses to the definition of  
4 watercourses is not in compliance with the GMA. Mercer Island counters with the  
5 argument that "piped watercourses", as defined by the city, do constitute critical areas and  
6 that there are no limits to the types of categories that can be protected as critical areas.

7 The Board concludes that Mercer Island did not comply with the GMA by protecting  
8 piped watercourses. The Field Guide indicates that the Mercer Island:

9 ... Critical Areas program focuses on protecting the natural portions of the City's  
10 watercourses and on restoring altered watercourses. (emphasis added). {Exhibit 7  
11 at p. 17}.

12 The Field Guide narrative further indicates that:

13 The Regulations are designed to protect a watercourse by not permitting  
14 disturbance within the watercourse corridor-- the land on either side of the  
15 watercourse. The boundary of the watercourse corridor includes the area within  
16 25 feet of the watercourse centerline. (emphasis added). {Exhibit 7, at p. 18}.

17 RCW 36.70A.060(2) requires counties and cities to protect critical areas. This  
18 requirement presumes that the critical area presently exists. A watercourse that has been  
19 piped (and which a landowner may or may not know exists on the property) is no longer a  
20 critical area. Although Mercer Island's effort to now protect what once had been a  
21 naturally flowing stream is admirable, this effort does not comply with the GMA  
22 requirement to protect critical areas. Retroactively protecting piped watercourses does  
23 not make up for the fact that what had formerly been a critical area (i.e., the naturally  
24 flowing stream) has been lost.

25 The Board's conclusion that the piped watercourse provision of Mercer Island's critical  
26 areas development regulation is not in compliance with the GMA does not prevent Mercer  
27 Island from having a comprehensive planning policy of attempting to reclaim formerly  
naturally flowing watercourses, or such a policy under other authority. If Mercer Island  
adopts such a policy in its comprehensive plan, it may choose to implement this policy  
through its subsequent development regulations.

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An area of land measured from the centerline of a watercourse on each side. The width of the  
corridor is 25 feet measured horizontally from centerline to the edge of the corridor. {Exhibit 7,  
Appendix C, Glossary of Terms, p. C-4}.

Conclusion of Law No. 9

1 "Piped watercourses" as defined in Mercer Island's Critical Areas Ordinance do not  
2 constitute "critical areas" as defined by the Growth Management Act at RCW  
3 36.70A.030(5). Therefore, the portions of Mercer Island Ordinance No. A-96 dealing  
4 with piped watercourses are not in compliance with the requirements of the Growth  
5 Management Act.

Issue No. 10

6 Do "publicly and privately owned passive open spaces" as discussed in Mercer Island's  
7 Critical Areas Ordinance constitute "critical areas" as defined in the Growth Management  
8 Act at RCW 36.70A.030(5)?

Discussion of Issue No. 10

9  
10 The phrase "publicly and privately owned passive open spaces" is undefined in the  
11 Ordinance. Interestingly, although the phrase is included within the Field Guide definition  
12 of "critical areas" {Exhibit 7, Appendix C, p. C-1} and therefore could lead one to  
13 assume that such open spaces are one of the five categories of a critical area, it is not  
14 discussed in the narrative portion of the Field Guide<sup>9</sup> which provides:

15         The Field Guide includes, in four separate sections, information to help you  
16 designate on your property the following Critical Areas that have been identified  
17 on Mercer Island (emphasis added):

18                   Geologic Hazard Area	19                   Wetland Areas
20                   Watercourse Areas	21                   Shoreline Areas {Exhibit 7, p. 4}.

22 Neither are "publicly and privately owned passive open spaces" mentioned in the large  
23 fold-out document entitled "Interim Regulations for Critical Areas" {Exhibit 8}.  
24 Therefore, the reader not only is unaware precisely what a "publicly and privately owned  
25 passive open space" is, but is uncertain (had the phrase been defined) whether such  
26 property is even being regulated by Mercer Island.

27 Just as a comprehensive plan must be internally consistent (see first paragraph of RCW  
36.70A.070), so too does this Board hold that interim development regulations must be  
internally consistent. Mercer Island's regulations, comprised of the Ordinance, Field  
Guide and Interim Regulations for Critical Areas, are not internally consistent where

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<sup>9</sup> "Publicly owned open spaces" are briefly mentioned but not defined in the discussion of "critical habitats." A distinction between "passive" and "active" open space is not made, nor are "*privately-owned* passive open spaces" discussed. {Exhibit 7, p. 26}.

1 Mercer Island has not defined "publicly and privately owned passive open space" nor  
2 enacted regulations for such areas.

3 RCW 36.70A.030(5) defines critical areas and RCW 36.70A.060(2) directs that local  
4 governments protect critical areas. Neither contains the words "open spaces" and, when  
5 read together, these sections mandate the undertaking of a task that is regulatory, rather  
6 than policy, in nature. Therefore, local jurisdictions are not required to protect open  
7 spaces through critical areas development regulations. By contrast, the words "open  
8 space" do appear at RCW 36.70A.020(9) and RCW 36.70A.070(1), the former being a  
9 planning goal and the latter a description of the land use element of a comprehensive plan.  
10 The nature of the tasks mandated by these two sections is policy rather than regulatory.  
11 Thus, *planning* for open spaces is explicitly mandated by the GMA while *regulating* open  
12 spaces through critical areas ordinances is not.

13 A comprehensive plan identifies the desired amount and character of open space in a  
14 community. It could establish as a policy objective increasing open space for a variety of  
15 reasons, (e.g., recreation, aesthetics, urban separation, public safety, wildlife habitat, etc.).  
16 The implementation of such a policy objective most commonly takes the form of land use  
17 regulations and/or budgets. Open space regulations have traditionally included such  
18 matters as building setbacks and may include such innovative techniques as transfer of  
19 development rights. Budget programs could include the acquisition of land in fee simple  
20 or open space easements.

21 In the case of critical areas regulations, however, there is no GMA mandated  
22 comprehensive plan in place to serve as a policy predicate for regulation of "publicly and  
23 privately owned passive open space". Absent such policy basis, is it appropriate to  
24 regulate "publicly and privately owned open spaces" with a critical areas ordinance  
25 adopted pursuant to RCW 36.70A.060?

26 The absence of a comprehensive plan policy does not bar Mercer Island from electing to  
27 regulate open spaces in its critical areas regulations. However, the City must first define  
the term and explain why open spaces constitute critical areas. In doing so, Mercer Island  
should take note that many of the areas and ecosystems specifically included in the  
statutory categories of critical areas (i.e., wetlands, fish and wildlife habitat conservation  
areas, geologically hazardous areas) will, by their very nature, have the quality of passive  
open space. Mercer Island must meet the designation requirements of RCW 36.70A.170  
before enacting the development regulation protections required by RCW 36.70A.060.  
Finally, as directed by RCW 36.70A.060(3), the interim critical areas designations and  
regulations must be reviewed when adopting the comprehensive plans. Mercer Island  
would then be obliged to alter its critical areas regulations as necessary to insure  
consistency.

Conclusion of Law No. 10

1 "Publicly and privately owned passive open space", as used in Mercer Island's Ordinance  
2 does not constitute a "critical area" as defined by the Growth Management Act.

3  
4 **D. ORDER**

5 Having reviewed the entire file and exhibits in this case, having considered the briefs and  
6 arguments of counsel, having entered the foregoing Findings of Fact and Conclusions of  
7 Law, the Board orders that:

8 The City of Mercer Island Ordinance, No. A-96, is affirmed in its entirety as in compliance  
9 with the requirements of the Growth Management Act and the State Environmental Policy  
10 Act except for the following portions which are **remanded**:

11 1.) That portion of the definition of watercourses as a category of critical areas that  
12 refers to "piped" watercourses. The Ordinance is remanded to Mercer Island with  
13 instructions to eliminate the reference to "piped" watercourses within the definition of the  
14 term "watercourses" and in the narrative portions of the Field Guide; and

15 2.) The designation and regulation of "publicly and privately owned passive open space".  
16 The Ordinance is remanded to Mercer Island with instructions for the city to either  
17 eliminate reference to the phrase "publicly and privately owned passive open spaces" or to  
18 define the phrase with particularity. In the event the phrase is defined, Mercer Island shall  
19 enact development regulations that protect such lands as required by the Growth  
20 Management Act at RCW 36.70A.060(2).

21 Pursuant to RCW 36.70A.300(1)(b), the Board directs Mercer Island to comply with this  
22 Final Decision and Order by 5:00 p.m. on Friday, April 30, 1993.

DATED this 5th day of January, 1993.

CENTRAL PUGET SOUND GROWTH PLANNING HEARINGS BOARD

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M. Peter Philley  
Presiding Officer

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Joe Tovar, AICP  
Board Member

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Chris Smith Towne  
Board Member

Note: This Final Decision and Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.