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.

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625, FAX (206)389-2588

The Board held a prehearing conference in this case on September 21, 1992. A Prehearing 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.

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

On October 8, 1992, the Board held a hearing on Mercer Island's motion to dismiss which 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 Order Denying Respondent's Motion to Dismiss on October 12, 1992.

On October 14, 1992, the three growth planning hearings boards met in Seattle to jointly 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 immediately. The permanent rules controlled for the duration of the case.

The hearing on the merits of the Petition for Review was held on November 2, 1992, in 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: M. Peter Philley, Joe Tovar and Chris Smith Towne. James Charles Tracy appeared *pro 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.

At the conclusion of the hearing, the Presiding Officer orally ordered Mercer Island to 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 submitted Exhibits 9 through 34 on November 9, 1992.

Having reviewed Exhibits 1 through 34, the prehearing briefs submitted by both parties, 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:

B. FINDINGS OF FACT

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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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}.

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

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

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

6. On August 14, 1991, a newspaper article appeared on the front page of the *Mercer 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 under consideration and gave the dates of upcoming Planning Commission hearings where the public was invited to comment. {Exhibit 10}.

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

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

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 members and Mr. Tracy were quoted in the article. {Exhibit 16}.

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 consultant and staff. City Council and Commission members asked questions of clarification, although little direction to staff about desired revisions was reported in the minutes. The Planning Commission then held a public hearing on the proposed critical

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

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

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

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

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

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

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}.

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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"[1]. 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.

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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

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

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

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

Although the Ordinance refers to the GMA only by reference to Chapter 36.70A RCW generally, and not to RCW 36.70A.060 specifically, it is nonetheless clear that the Ordinance was enacted pursuant to RCW 36.70A.060. As indicated above, the Ordinance specifically refers to Interim Critical Areas Regulations in its caption. In addition, an examination of the legislative findings by the Mercer Island City Council reveals this 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).

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

The fifth legislative finding specifies:

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

The sixth finding also states:

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

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

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

Conclusion of Law No. 1

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

Issue No. 2

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

Discussion of Issue No. 2

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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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).

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

Conclusion of Law No. 2

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

Issue No. 3

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

Discussion of Issue No. 3

a. SEPA

The State Environmental Policy Act (SEPA), unlike the GMA, has no specific public participation requirements set forth in a unique section of the act. Instead, SEPA focuses on a public notice process that implies that public participation will occur. RCW 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).

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

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

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

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

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

In instances where a determination of significance is reached, an "expanded scoping" process can be implemented. (see WAC 197-11-410.) However, even this process is 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.

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625, FAX (206)389-2588

b. GMA

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

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

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

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

---

[2] The Board is aware that the phrase "citizen participation", as opposed to "public" participation, is used within the GMA. RCW 36.70A.020, entitled "Planning goals", provides as follows:

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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

Conclusion of Law No. 3

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

Issue No. 4

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

Discussion of Issue No. 4

The heart of the GMA's public participation requirements is clearly RCW 36.70A.140. This provision mandates that local governments planning under the GMA establish procedures for early and continuous public participation in addition to any other existing statutory requirements for public participation. It is crucial to note that this "enhanced" public participation requirement applies only to "... comprehensive land use plans and development regulations implementing such plans". As previously discussed, two types of development regulations exist: "interim" development regulations required by RCW 36.70A.060 and "implementing" development regulations required by RCW 36.70A.120. RCW 36.70A.140 refers only to the latter -- implementing development regulations. If the legislature intended the public participation requirements of RCW 36.70A.140 to apply to RCW 36.70A.060's "interim" development regulations, it would have required it by 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.[3]

[3] 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".

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

The legislature's GMA scheme requires enhanced public participation for the development 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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

scrutinize the level of public participation afforded to members of the public during the 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.

In particular, the Board expects that the procedures for enhanced public participation required by RCW 36.70A.140 will be adopted by the legislative body of each jurisdiction planning under the GMA. The simplest way to adopt these procedures would be as either a motion or resolution, but in any case they should be in concise written form and effectively communicated to individual citizens as well as interest groups. The specific content of locally adopted procedures will vary depending on local circumstances or other 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).

These enhanced public participation procedures may include public involvement procedures or techniques required by other statutes or local ordinances. However, it is important to acknowledge that the methods required by SEPA, for example, fall far short of "enhanced" public participation for two reasons. First, SEPA procedures for public 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.

Conclusion of Law No. 4

The Growth Management Act's enhanced public participation requirements, as specified in RCW 36.70A.140, do not apply to the process for adopting development regulations 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.

Issue No. 5

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

Discussion of Issue No. 5

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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

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

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

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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

Conclusion of Law No. 5

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

Issue No. 6

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

Discussion of Issue No. 6

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

Mercer Island issued a Determination of Non-Significance (DNS) on December 6, 1991, that contained the following "description of proposal"[4]:

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

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

The Washington Supreme Court has indicated that "the purpose of notice statutes is to apprise fairly and sufficiently those who may be affected of the nature and character of an action so they may intelligently prepare for the hearing." *Nisqually Delta Association v. DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985); *Barrie v. Kitsap County*, 84 Wn.2d 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

---

[4] 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}

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

The *Glaspey* court adopted the following rule:

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

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

> Notice that the board would hold a hearing "for the purpose of discussing the pros and cons" of a proposed ordinance was insufficient. It did no more than reveal that the board intended to hear public discussion for and against it. (citation omitted). <u>The notice did not disclose, however, the board's plan to propose substantial amendments of its own.</u> Rather, it directed the public's attention to a specific proposed amended ordinance, said to be on file in the board's office, about which the hearing was supposed to be held. <u>Had one gone to the board's office to study the ordinance in preparation for the hearing, as plaintiff did, no indication of contemplated changes would have been found.</u> Yet, the board possessed two 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*

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

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

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

In contrast to the *Port of Edmonds* case (where no one who read the notice would have had even the slightest clue that a condemnation proceeding would be discussed), Mercer Island's notice of the issuance of a DNS did inform the reader that the determination could be appealed to the city council. Persons interested in the proposed ordinance would still have been required to obtain a copy of the proposal, scrutinize it and compare it with the requirements of the GMA in order to intelligently prepare for the city council's hearing. 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.

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

To be useful as a part of enhanced public participation, notice would have to be both better distributed and more descriptive than was the case with Mercer Island's notice of a determination of nonsignificance for its proposed critical areas regulations. Whether publication of notice is required or voluntary, notice must be sufficiently descriptive to alert a reader to the major issues at hand and the ways in which to further participate in 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?

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

Discussion of Issue No. 7

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

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

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

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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

Conclusion of Law No. 7

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

Issue No. 8

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

Discussion of Issue No. 8

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

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

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

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

Mercer Island's response is that the legislative definition does not preclude a jurisdiction from addressing and including other categories as critical areas. The city points out that if 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.

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

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

Conclusion of Law No. 8

The Growth Management Act's definition of "critical areas" at RCW 36.70A.030(5) is not exclusive and prescriptive: local governments must consider, but are not bound by, that 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.

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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

Issue No. 9

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

Discussion of Issue No. 9

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

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

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

> (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:
>
> ...
>
> (d) Critical areas.
>
> (2) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050. (emphasis added).

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

> 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. (emphasis added).

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

[6] The Board presumes that Mercer Island obtained a one hundred eighty day extension of its deadline for adopting a critical areas development regulation pursuant to RCW 36.70A.380.

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

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

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

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

> A year-round or intermittent naturally flowing stream which exhibits the following characteristics, in part or whole: a steam or route formed by nature or modified by humans; generally consisting of a defined channel with a bed, banks, or sides for a substantial portion of its length on the lot; and watercourses which exhibit the above characteristics and have been channelized or piped. Watercourses do not 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.[8]

---

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

[8] A "watercourse corridor" is defined as:

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

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

The Field Guide narrative further indicates that:

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

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

The Board's conclusion that the piped watercourse provision of Mercer Island's critical areas development regulation is not in compliance with the GMA does not prevent Mercer 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.

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}.

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

Conclusion of Law No. 9

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

Issue No. 10

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

Discussion of Issue No. 10

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

> The Field Guide includes, in four separate sections, information to help you designate on your property the following Critical Areas that have been identified on Mercer Island (emphasis added):
>
> | | |
> |---|---|
> | Geologic Hazard Area | Wetland Areas |
> | Watercourse Areas | Shoreline Areas {Exhibit 7, p. 4}. |

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

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

---

[9] "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}.

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

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

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

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

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

The absence of a comprehensive plan policy does not bar Mercer Island from electing to 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.

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

Conclusion of Law No. 10

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

D. ORDER

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

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

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

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

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

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588

DATED this 5th day of January, 1993.

CENTRAL PUGET SOUND GROWTH PLANNING HEARINGS BOARD

M. Peter Philley
Presiding Officer

Joe Tovar, AICP
Board Member

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.

Central Puget Sound
Growth Planning Hearings Board
2329 One Union Square
600 University Street
Seattle, WA 98101-1129
(206)389-2625 FAX (206)389-2588