

CENTRAL PUGET SOUND

GROWTH PLANNING HEARINGS BOARD

State of Washington

JAMES C. GUTSCHMIDT,)

Petitioner,)

)Case No. 92-3-0006

and)

)

WILLIAM H. WRIGHT and)

RALPH GUTSCHMIDT,)

Intervenors,)

)

v.)**FINAL DECISION AND ORDER**

)

CITY OF MERCER ISLAND,)

Respondent.)

_____)

A. PROCEDURAL HISTORY OF THE CASE

[Because of the lengthy nature of the procedural history in this case, it is attached as Appendix 1 to this Final Decision and Order.]

B. FINDINGS OF FACT

1.The Growth Management Act (GMA or the Act) requires and authorizes each city and county in the state to designate critical areas (RCW 36.70A.170(1)(d)) and to adopt development regulations that protect critical areas so designated (RCW 36.70A.060(2)), on or before September 1, 1991.

2.The City of Mercer Island (Mercer Island or the City) Planning Commission (the Commission), acting at the direction of the Mercer Island City Council (City Council), held public meetings, workshops and hearings commencing in May, 1991 to consider interim critical areas regulations, as follows: {Exhibits R-1 and P-67}

a.On May 15, City staff presented the Work Program Structure and Assumptions for the Critical Lands Policy and discussed classification and interim guidelines; passive open space, and the required public involvement process.

b.On June 12, Henigar & Ray, the City's technical consultant for GMA compliance actions,

presented information to the Commission on soils mapping, and analysis of existing regulations and identification of duplications, deficiencies and conflicts. Planning staff presented a "Review of GMA Planning Goals and Definitions" and a draft critical areas work program.

c. On June 19, staff presented draft criteria for aquifer recharge and geologic hazard areas, and worked with the Commission to refine methods of public communication, emphasizing use of newspaper articles.

d. On July 3, staff presented a new critical areas work program schedule to the Commission.

e. On July 30, the Commission considered aquifer recharge areas.

f. On August 15, the Commission held a special work session with its technical consultant concerning shorelines, watercourses, wetlands and habitats.

g. On September 4, the Commission held a work session on the open space element of the proposed critical areas regulation.

h. On October 16, the Commission discussed a proposed critical areas ordinance.

i. On November 6, the Planning Commission, meeting jointly in a work session with the City Council, heard staff presentations on critical areas requirements in the Growth Management Act, the City Vision Statement, 1991 City Council priorities, the Commission's critical lands goal, and a "Summary of Mercer Island's Proposed Interim Regulations for the Critical Areas." The City's geotechnical consultant explained procedures to identify geologic hazards, and development requirements where such hazards are found on a site. Following the work session, the Commission held its regular meeting, hearing public testimony on the proposed critical areas ordinance. At the conclusion of public comments, it directed staff to make the language in the regulations more "user friendly", to provide better public information, and to seek the state's permission to extend the deadline for adopting the ordinance. The Commission then asked the City's Development Services Advisory Board to review the proposed field guide, and to provide comments on its format.

j. At its November 20 meeting, the Commission continued its discussion of critical lands issues, and voted unanimously to "extend the deadline date for interim regulations to December 4, 1991."

k. On December 4, the Commission held a hearing on the proposed critical lands ordinance. James Gutschmidt testified in opposition to several provisions of the proposal. After considering amendments to the proposal and defeating a motion to adopt, the Commission voted to request a time extension to allow for further citizen involvement and staff work.

l. On February 5, 1992, the Commission held a public hearing on a proposed critical lands ordinance, consisting of the ordinance itself, interim critical lands regulations, an amendment relating to appeals, and a field guide. The meeting minutes show that James Gutschmidt testified that the ordinance would prevent him from building on slopes in excess of 30%; that the wetlands definition needed clarification, and that, in general, the ordinance was too severe. Intervenor Ralph Gutschmidt testified in opposition to the proposed regulations, especially the provision requiring peer review. Intervenor Bill Wright

questioned how the City intended to implement the ordinance, asked that peer review be conducted by an applicant's engineer, noted the controversial nature of the wetlands section, and stated that the ordinance would result in a loss of property values and taking of private property. At the conclusion of the hearing, the commission amended sections of the proposal relating to geologic hazards delineations and alterations criteria performance standards for development and directed the Commission staff/developer to hold quarterly meetings to review issues and recommend amendments to the Commission if and as appropriate. It then voted unanimously to recommend to the City Council that the interim critical areas regulations be adopted as amended. {Exhibit R-1 }

3. The City Council held public meetings, public hearings and workshops concerning proposed critical areas regulations, as follows {Exhibit P-67}:

a. On June 24, 1991, the Council agenda included a staff presentation on the critical lands project, with an overview, timeline and work plan.

b. On July 3, the Council agenda again included an item relating to critical lands.

c. On October 28, the Council agenda included a report from a councilmember on critical lands.

d. On November 25, the Council's consent calendar included "AB 2618 - Critical Areas Interim Ordinance."

e. On December 9, the Council agenda included a public hearing on "Critical Lands Ordinance Presentation."

f. On February 24, 1992, the City of Mercer Island City Council considered proposed Ordinance A-96, "Adopting Interim Critical Areas Regulations in accordance with the provisions of the Washington State Growth Management Act, Chapter 36.70A RCW. . ." as recommended by the Planning Commission. The Summary Statement {Exhibit R-3} prepared by City staff and presented to the City Council characterized the approach of the regulation as based on performance standards that will allow "for flexible application of regulatory provisions while maintaining a more 'site specific' approach..." In describing the parts of the Ordinance, the staff report commented that "in general, the regulatory provisions contained in the ordinance focus on the use of setbacks, site coverage and stormwater controls to protect the Island's critical areas. While the ordinance can result in some significant development limitations on the most sensitive or hazardous sites, it also allows for flexibility (through waivers, deviations and appeals) in applying the regulatory tools when an applicant can demonstrate that the potential negative environmental impacts can be avoided or mitigated."

g. The Council heard testimony from James Gutschmidt and Intervenors Ralph Gutschmidt and Bill Wright, among others, in opposition to adoption of the ordinance. Among their concerns was the regulatory "taking" of property without compensation. In considering the motion to adopt, the Council rejected an amendment to delay adoption in order to allow for further refinements, accepted an amendment to a performance standard relating to storm water, and adopted the ordinance as amended. {Exhibit R-5} The Council then adopted a

motion directing a Working Group created by the Commission to review and recommend improvements to the ordinance in three months.

4. On December 6, 1991, Mercer Island's Responsible Official, finding that the proposed Interim Critical Areas Regulations did not have a probable significant adverse impact on the environment, issued a Determination of Non-Significance (DNS). The DNS document included instructions on how to appeal the decision. {Exhibit R-2}.

5. On February 24, 1992, the City of Mercer Island City Council adopted Ordinance A-96 (the Ordinance), that was captioned "An Ordinance of the City of Mercer Island, Washington adopting Interim Critical Areas Regulations in accordance with provisions of the Washington State Growth Management Act, Chapter 36.70A RCW...." Notice of adoption of the Ordinance was published on March 11, 1992. May 10, 1992 was the sixtieth day after publication of notice of adoption of the ordinance which is the subject of this petition for review.

Mercer Island Ordinance A-96 is codified as a new chapter 19.10 in the City's Land Use Code, entitled "Environmentally Sensitive Areas". {Exhibit R-5} Section 19.10.020, entitled "Adoption of Interim Critical Areas Regulations" (Interim Regulations), provides:

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, including such future amendments as may be made thereto by the City Council by ordinance.

Section 19.10.030 provides:

Adoption of Field Guide to Critical Areas. The Field Guide to Mercer Island's Critical Areas which is attached to this ordinance as Exhibit 2 is hereby adopted and incorporated herein by reference including such future amendments or changes as may be made thereto from time to time by City staff.

6. The Interim Regulations referenced at Section 19.10.020 consist of a single oversized sheet. The first section, "Performance Standards for All Development", outlines the process for permit and subdivision applications and site development standards and exceptions. The second section, "Interim Regulations for Critical Areas", is a matrix with horizontal headings of "Geologic Hazard Areas", "Watercourse Areas", "Wetland Areas", and "Shoreline Areas". Vertical headings are: "General Requirements and Delineations", "Site Development", "Site Coverage", "Stormwater and Erosion Control" and "Alterations". Section three defines terms found in the Critical Areas Regulations. Section four, "General Provisions", describes the applicability of the regulations, and describes appeal procedures, fees, and indemnification agreements. {Exhibit R-8}

7. In *The Field Guide to Mercer Island's Critical Areas* (the Field Guide) {Exhibit R-7} discussed in Section 19.10.030, the *Introduction* (pp. 1-7) characterizes its purpose as an aid to

a potential developer of property to gather site information (inventory) and to prepare development plans, in order to assure development consistent with the City's Vision Statement. A Geologic Hazard Areas section (pp. 9-15) sets forth detailed descriptions of and standards for development of erosion, landslide, seismic hazard and critical slope areas. The Watercourse Areas section (pp. 17-18) describes the classification of natural and altered watercourses, and regulations to protect them. Wetland Areas (pp. 19-21) generally describes the characteristics and purposes of wetlands, and the means to be used to protect them. Shoreline Areas (pp. 23-24) explains why such areas have been designated as Critical Areas, and describes protective measures. Critical Habitats (pp. 25-27) sets forth the purpose for protection, habitat characteristics, and protective measures. Appendices A through G provide an applicant with a Critical Areas Worksheet (App. A); Guidelines for Geotechnical Reports (App. B); Glossary of Terms (App. C); Field Method for Soil Identification (App. D); Partial Listing of Wetland Vegetation Types (App. E); Listing of Plant Species Found in King County (App. F.); and The Appeal Process (App. G).

8. The *Mercer Island Reporter*, a weekly newspaper, published information about Planning Commission and City Council activities relating to consideration of the proposed Critical Areas regulations as follows: {Exhibit P-6 and -9, and R-6}

July 31, 1991: Planning Commission work session on geologically hazardous areas to be held on August 8, 1991.

August 14, 1991: Article discussing City's work on critical areas regulations and other GMA requirements.

August 21, August 28 and September 4, 1991. Commission work session on passive open space designation in compliance with GMA requirements to be held on September 4, 1991.

October 16, 1991: Commission meeting to discuss proposed critical lands ordinance will be held on October 16, 1991.

October 23 and November 6, 1991: Commission will hold public hearing on Interim Critical Areas Ordinance on November 6, 1991.

November 6, 1991: Article on GMA compliance generally, and specifically the preparation of a critical lands ordinance.

November 20, 1991: Commission meeting to discuss critical lands ordinance to be held on November 20, 1991.

November 20, 1991: Commission will continue a public hearing on proposed critical areas ordinance on December 4, 1991.

December 4, 1991: Article on December 4 Commission hearing and December 9 City Council hearing on critical areas interim regulations.

December 4, 1991: Commission public hearing on proposed critical areas ordinance to be held December 4, 1991.

January 22, 1991: Public notice of Commission hearing on ordinance addressing interim regulations to protect critical land areas to be held February 5, 1992.

January 29, 1992: On January 27 and January 28, Commission considered changes to

proposed interim critical lands regulations scheduled for public hearing February 5, 1992. February 5, 1992:"Forum" article on City's activities to comply with GMA, including critical lands regulation; article on specific provisions of proposed regulations.

February 5, 1992:Letters to editor commenting on proposed critical lands ordinance, including a letter from Petitioner James Gutschmidt and Intervenor Ralph Gutschmidt, and a letter from Committee to Preserve the Right to Private Ownership and Property Rights signed by Intervenor Ralph Gutschmidt and others.

February 5, 1992:Commission hearing on proposed interim critical lands regulations will be held February 5, 1992.

February 12, 1992:Article on Commission actions amending proposed interim critical lands ordinance and transmitting it to City Council for adoption; describing comments from citizens, including Petitioner James Gutschmidt and Intervenor Ralph Gutschmidt.Article announcing City open house to explain proposed critical lands ordinance, to be held February 20, 1992.

February 19, 1992:Article on February 20 open house on critical areas ordinance; article on provisions of proposed ordinance with "Guide to ordinance impact"; article on citizen group opposing ordinance, quoting James Gutschmidt.

9.The Central Puget Sound Growth Planning Hearings Board (the Board) takes notice of its Final Decision and Order issued in *Tracy v. Mercer Island*, (*Tracy*) Case No. 92-3-0001 on January 5, 1993.*Tracy* involved the same ordinance at issue in this case.

C.DISCUSSION AND CONCLUSIONS

1.Issues Raised by the Board

Legal Issue No. A-1

Does the Board have jurisdiction to consider requirements of statutes other than the Growth Management Act and the State Environmental Policy Act?

RCW 36.70A.280 is the controlling statute for determining the extent of the Board's subject matter jurisdiction.It is entitled "Matters subject to board review".Subsection (1) provides:

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).¹¹

Paraphrased, RCW 36.70A.280(1) indicates that the Board has jurisdiction to make decisions only on issues claiming that the GMA, or SEPA as it relates to GMA requirements, was not

complied with when plans and regulations were adopted.

The Board has previously held that "[T]his Board has jurisdiction only over matters specified in RCW 36.70A.280." *Tracy*, at 20. Therefore, when a petition for review alleges that a local jurisdiction failed to comply with a statute other than one named in RCW 36.70A.280(1), the Board does not have jurisdiction to make a decision on the issue of compliance.

This does not mean that the Board will not take official notice of "other" statutes besides those specified in RCW 36.70A.280. For example, in *Snoqualmie v. King County*, CPSGPHB Case No. 92-03-0004, the Board articulated a test for determining whether a specific substantive countywide planning policy had intruded upon an individual city's authority derived from other statutes. The second inquiry in the Board's three prong test was to determine whether the land use authority of cities had been altered by the specific policy. In order for the Board to determine whether land use authority has been altered, it must review "other statutes" apart from the GMA or SEPA. The key distinction is that the Board has jurisdiction to decide only whether adopted GMA documents are in compliance with the GMA or SEPA; the Board does not have jurisdiction to determine whether "other" statutes have been violated.

The Board notes that the reason this issue was originally raised in *Tracy* was a concern with having bifurcated appeals. The uncertainty over which body (a growth planning hearings board or a court) had jurisdiction over a specific issue might create delay which could result in the conflict with running of the applicable statute of limitations. Alternatively, an appellant would have to file costly simultaneous appeals with the Board and the judicial system. This is the same matter raised by James Gutschmidt and the intervenors. Although the Board certainly sympathizes with this concern, it cannot expand its own jurisdiction -- only the legislature can do that.^[2]

Conclusion No. A-1

The Board does not have jurisdiction over statutes other than the Growth Management Act (as defined at WAC 242-02-040(1)) and the State Environmental Policy Act. Although the Board cannot determine whether "other" legislation has been violated, the Board does have the authority to review and consider other statutes.

Legal Issue No. A-2

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

In *Tracy* the Board held that:

"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." (*Tracy*, at 21 - Conclusion of Law No. 7).

The Board pointed out that it would make its decision by applying the GMA's standard of review at RCW 36.70A.320: actions taken by local jurisdictions in adopting comprehensive plans and development regulations are presumed valid. Only if the petitioner proves by a preponderance of the evidence that the local action is not in compliance with the Act, will this presumption be overcome. (see also WAC 365-195-050).

Conclusion No. A-2

The Board has jurisdiction to determine whether and in what particular manner a local government has exceeded its authority or the requirements of the Act in adopting critical areas regulations pursuant to RCW 36.70A.060.

Legal Issue No. A-3

Does the Board have jurisdiction to determine federal and state constitutional issues arising from the City's implementation of the Act?

Gutschmidt raised a series of specific legal issues challenging the constitutionality of the City's actions. In response, the Board raised this issue. Mercer Island filed a motion to dismiss all constitutionally-based legal issues raised by James Gutschmidt. Accordingly, a hearing on this motion was held and the Board granted the City's request (see Order on Prehearing Motions entered in this case on December 31, 1992, pp. 10 - 13). The Board held that:

The Growth Planning Hearings Boards clearly do not have jurisdiction to consider whether a local jurisdiction's regulations violate the Freedom of Speech or Religion Clauses. Nothing in the Act explicitly or implicitly grants the Board the authority to answer these constitutional questions.

...

The Board concludes that it lacks the requisite specific authority to determine whether Mercer Island Ordinance No. A-96 is unconstitutional because it violates the rights of private property owners. Instead, the Board has jurisdiction only to determine whether a local government appropriately considered the potential of unconstitutional takings before adopting a regulation or plan under the Act.

Conclusion No. A-3

The Board does not have jurisdiction to determine federal and state constitutional issues arising from the City's implementation of the Act. Challenges to the constitutionality of a local jurisdiction's actions under the Growth Management Act or to the constitutionality of the Act itself must be filed with the superior courts.

2. Issues Raised by Petitioner

Legal Issue No. B-1

Does the City of Mercer Island's Ordinance No. A-96 adopting Interim Critical Areas Regulations ("the Ordinance") comply with the goals of the Act, RCW 36.70A.020?

RCW 36.70A.020, entitled "Planning goals", provides:

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:

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
- (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.
- (4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.
- (5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.
- (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.
- (7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.
- (8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.
- (9) Open space and recreation. Encourage the retention of open space and development of recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

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

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

(13) Historic preservation. Identify and encourage the preservation of lands, sites, and structures, that have historical or archaeological significance. (emphasis added).

The Mercer Island Ordinance is a development regulation adopted pursuant to RCW 36.70A.060 (2). Such a development regulation is often referred to as an "interim development regulation"^[3] or a "critical areas ordinance". It is distinguishable from an "implementing development regulation" required by RCW 36.70A.120.^[4] The GMA's planning goals, listed at RCW 36.70A.020, apply to both comprehensive plans and "development regulations". The Board has previously held that:

... when the GMA simply refers to "development regulations" alone, without any indication as to which specific type of development regulation is being discussed... 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. (*Tracy v. Mercer Island*, CPSGPHB Case No. 92-3-0001 - Final Decision and Order, at 14).

Therefore, the planning goals listed in RCW 36.70A.020, that "guide the development of development regulations", do apply to the Mercer Island Ordinance since the latter is a development regulation, albeit an interim one.

Next, the Board must determine what the legislature meant by using the verbs "to guide" and "guiding" in the prefatory paragraph in RCW 36.70A.020. To **guide** means:

to point out the way for; direct on a course; conduct; lead. *Webster's New World Dictionary of the American Language* 621 (2d College Ed. 1984).

Because this Board has never reviewed the provisions of RCW 36.70A.020 prior to this case, this is an issue of first impression. However, the Attorney General of Washington has issued an opinion directly on point. In AGO 1992 No. 23, the Attorney General was asked whether the growth planning hearings boards have the statutorily conferred jurisdiction to hear a claim which alleges that a city or county failed to properly consider the impact of its comprehensive plans or regulations on private property rights, i.e., the planning goal listed in subsection (6). In answering this question in the affirmative, the AGO placed emphasis on the "to guide" and "for the purpose of guiding" language in the introductory paragraph in RCW 36.70A.020. Although the AGO never explicitly asked the question raised above (i.e., what did the legislature mean by the "guidance" language?), the opinion repeatedly answered it. The Attorney General's Office concluded that the guidance language in RCW 36.70A.020 means that a local jurisdiction must

consider the GMA's planning goals:

... the GMA also sets forth a list of goals which are to be considered in enacting plans and regulations.... (AGO 1992 No. 23, at 3; emphasis added).

...

The GMA contains a list of goals which must be considered in developing comprehensive plans and regulations....(AGO 1992 No. 23, at 6; emphasis added).

...

The GMA lists 12 other goals which must also be considered in developing comprehensive plans and regulations. These goals cover a number of areas... The GMA does not dictate any particular goal, such as the protection of property interests, should dominate over other goals. Rather, there is an inherent tension in seeking to accommodate by comprehensive action all of these goals, some of which are in conflict. Government entities must weigh these goals and exercise discretion in determining how to address them in enacting their plans and regulations.

Thus, with regard to property rights, a government entity is not in compliance with the GMA if it fails to consider property rights in developing its plans and regulations, or, if it considers property rights in an arbitrary and discriminatory manner....(AGO 1992 No. 23, at 8; emphasis added).

...

The GMA is directed at comprehensive decisions. The requirements deal with the necessary elements and *considerations* on a broad basis. RCW 36.70A.370 must be evaluated in terms of the overall intent of the GMA.^[5] With this view, the process is established to ensure that government entities *consider* the overall issue of the possible constitutional compensation requirement for the taking of property. It is not intended as a mechanism for addressing whether there is in fact a taking and, if so, what is the compensation that is required to be paid for a particular piece of property. (AGO 1992 No. 23, at 11; underlining in original; italics added).

The Board agrees with the Attorney General's analysis on this point. Accordingly, the Board holds that cities and counties planning under the Act must consider the planning goals listed at RCW 36.70A.020 before adopting comprehensive plans and development regulations.

What then does "consider" mean? To "**consider**" means:

To fix the mind on, with a view to careful examination; to examine; to inspect. To deliberate about and ponder over. To entertain or give heed to. *Black's Law Dictionary* 277 (5th ed. 1979).

In order to prove that a local jurisdiction has "considered" the planning goals, the Washington State Department of Community Development - Growth Management Division (DCD) recommends in its Procedural Criteria^[6] that when adopting comprehensive plans:

[P]lanning jurisdictions should consider including at the onset a separate section addressing the statutory goals and how the plan deals with each of them. This section should also identify any supplementary goals adopted. (WAC 365-195-300(2)(b)).

Although this provision deals with comprehensive plans and the Procedural Criteria themselves do not "affect planning decisions and actions made pursuant to the Act before this chapter became effective" (WAC 365-195-030(4)), the Board nonetheless fully supports DCD's recommendation. The easiest way to show that a jurisdiction has "considered" planning goals is to acknowledge their existence in writing.

This recommendation is a practical one; however, it is not a mandatory requirement. To give serious thought to something, to ponder it or carefully examine it does not mean that written proof of that subjective process must exist. Whether the document in question is an interim critical areas development regulation, a comprehensive plan or an implementing development regulation, it need not have an explicit discussion of the planning goals. However, the Board strongly recommends that the document itself or a part of the underlying record contain such a discussion, so that there can be no question that planning goals were "considered". Especially in adopting comprehensive plans and implementing development regulations, it is crucial to balance the thirteen planning goals. This balancing of competing goals and their application to local circumstances cries out for documentation.

Whether a local jurisdiction decides to explicitly consider the planning goals in writing remains in that jurisdiction's discretion. However, whether the planning goals are just mentally considered or discussed in writing, the hurdle that the document in question must clear is achieving compliance with the GMA. RCW 36.70A.290(2) requires that comprehensive plans and development regulations "meet" or are "in compliance" with "the goals and requirements" of the Act.^[7] Therefore, the Board holds that both types of development regulations, interim and implementing, must meet or be in compliance with the planning goals of the Act specified at RCW 36.70A.020.

It is important to note that the level of compliance will vary depending upon the document in question. As the Board discussed in its *Snoqualmie* decision:

CPPs [countywide planning policies] are part of a hierarchy of substantive and directive policy. Direction flows first from the CPPs to the comprehensive plans of cities and counties, which in turn provide substantive direction to the content of local land use regulations, which govern the exercise of local land use powers, including, zoning, permitting and enforcement. *Snoqualmie*, at 17.

The hierarchy cited in *Snoqualmie* deals with the GMA's two major policy documents: CPPs and comprehensive plans. It starts with the *framework* -- the CPPs, which in turn influence the comprehensive land use plan. In contrast to these planning tools, implementing development regulations are not planning documents; they are regulations. As such, they are the final document in the hierarchy. They cannot exist until after the CPPs and comprehensive plans have been enacted.

Where this logical progression breaks down is with interim development regulations for critical areas and natural resource lands. Instead, of being required after CPPs and comprehensive plans have been adopted, they came first out of necessity. Interim development regulations are different by nature than implementing regulations. For one, they are "interim" in nature (see RCW

36.70A.060(3)). In addition, under the GMA, critical areas regulations have only one explicit goal: to protect critical areas.⁸¹ As such, this type of development regulation is self-guided by an internal goal. In contrast, comprehensive plans and implementing development regulations must balance thirteen goals. It makes perfect sense for local jurisdictions to be required to consider RCW 36.70A.020's planning goals before adopting CPP's and comprehensive plans, since these goals are the *foundation* for the framework to be built upon. However, it makes less sense for these *planning* goals (i.e., by their very name, goals to guide the development of policy documents such as CPPs and comprehensive plans) to be considered when adopting interim development regulations since the latter must be adopted before CPPs or comprehensive plans have been adopted; in essence, before any policy planning has occurred.

Nonetheless, the Act requires local jurisdictions to consider the planning goals when adopting any development regulation, interim or implementing. In order to reconcile this statutory requirement with the Board's own understanding of the hierarchy of planning established by the Act, the Board holds that local jurisdictions will be held to a lesser standard of compliance for considering planning goals when adopting interim critical areas development regulations than they will when adopting comprehensive plans or implementing development regulations. Finally, it is crucial to note that RCW 36.70A.020 indicates that the thirteen planning goals are not listed in order of priority. Despite the Board's conclusion that development regulations must be guided by planning goals, individual jurisdictions have a large degree of discretion in how they meet a specific planning goal. This conclusion is consistent with the "bottom up" approach taken by the legislature in enacting the GMA -- an approach that highlights regional diversity. A close examination of the thirteen goals reveals that they cannot be uniformly applied throughout the state. For example, encouraging development in urban areas may mean one thing in a highly developed city within the Central Puget Sound region but have an entirely different meaning in a small incorporated area in eastern Washington. Likewise, maintaining and enhancing natural resource-based industries means something totally different in northeastern Washington than it does in Seattle. DCD was aware of this dilemma with the planning goals in adopting its Procedural Criteria for the GMA. WAC 365-195-060(1) provides:

The Act lists 13 overall goals in RCW 36.70A.020. Comprehensive plans and development regulations are to be designed to meet these goals. The list of 13 goals is not exclusive. Local governments may adopt additional goals. However, these additional goals must be supplementary. They may not conflict with the 13 statutory goals. Comprehensive plans must show how each of the goals is to be pursued consistent with the planning entity's vision of the future. Differences in emphasis are expected from jurisdiction to jurisdiction. In some cases meeting certain of these goals may involve support for activities beyond jurisdictional boundaries. In most cases, if a comprehensive plan meets the statutory goals, development regulations consistent with the comprehensive plan will meet the goals.

Just as the planning goals are not likely to be uniformly considered statewide, an individual jurisdiction may find it difficult to uniformly apply the thirteen goals. The Washington Attorney

General has suggested that at least some of the thirteen goals conflict.^[9] Whether one goal conflicts with another cannot easily be determined in a vacuum; instead, specific goals will have to be applied to actual circumstances in each community. However, it is safe to say that the goals certainly compete -- there is indeed a "tension" between and among them. In conclusion, the Board holds that James Gutschmidt has failed to overcome the presumption of validity granted to Mercer Island in adopting its critical areas development regulations. The preponderance of the evidence indicates that the City did take the planning goals into consideration.^[10] The Ordinance meets or complies with the planning goals listed at RCW 36.70A.020.

Conclusion No. B-1

RCW 36.70A.020, the planning goals provision of the GMA, applies to both types of specific development regulations mandated by the Act: interim development regulations required by RCW 36.70A.060 and implementing development regulations required by RCW 36.70A.120. Local jurisdictions must consider the planning goals in adopting development regulations and comprehensive plans. In addition, both types of development regulations and comprehensive plans must *meet* or *comply* with the Act's planning goals. However, local jurisdictions will be held to a higher standard of compliance with the planning goals in adopting comprehensive plans and implementing development regulations than they will for adopting interim development regulations. Mercer Island's Ordinance complies with the GMA's planning goals.

Legal Issue No. B-2

Did the City comply with the requirements of the Act, specifically RCW 36.70A.170, in adopting its Ordinance? Does the City's failure to locate critical areas in that Ordinance have the effect of shifting the burden of compliance to private property owners?

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

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

(a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;

(b) Forest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber;

(c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals; and

(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)

In order to comply with the requirement of RCW 36.70A.170, Mercer Island adopted the Ordinance {Exhibit R-5; see Finding of Fact No. 5}. The Interim Regulations and Performance Standards for All Development (Performance Standards) discuss seven types of reports and surveys that applicants for all development greater than 120 square feet and all short plat, subdivision and lot line revisions might have to submit. Six of the seven reports and surveys are described in the City's Performance Standards. {Exhibit R-8}. Three documents are mandatory for all applicants: a Site Survey with 2-foot contours, showing all existing natural and built features (section I(B)(1)); a Site Construction Plan (section I(B)(2)); and a Geotechnical Report prepared by a geotechnical engineer (section I(B)(3)).

The Performance Standards also list three documents that may be required under certain circumstances: a Stormwater Control Management Plan (section IV(A)(1)); a Site Restoration Plan (Section V(A)(1)); and a Priority Species and Habitat Study (a Priority Species and Habitat Study).

Finally, the Interim Regulations (as opposed to the Performance Standards) require a Critical Areas Restoration Plan under specified circumstances {see Exhibit R-8; Interim Regulations for Critical Areas, section V Alterations}.^[11]

James Gutschmidt alleges that the City is not complying with the GMA because it is requiring individual property owners, rather than the City itself, to "designate" critical areas. (Petitioner's Prehearing Brief, at p. 21).

In order to make a determination on this issue, the Board must examine the definition of "designate". It is not defined by the GMA. When a statute does not define a material term, the word should be given its ordinary meaning. In ascertaining common meaning, resort to dictionaries is acceptable. *TLR, Inc. v. Town of La Conner*, 68 Wn. App. 29, 33, ___ P.2d ___ (1992). To "**designate**" means:

To indicate, select, appoint, nominate, or set apart for a purpose or duty, as to designate an officer for a command. To mark out and make known; to point out; to name; indicate. *Black's Law Dictionary* 402 (5th ed. 1979).

In addition to this definition, DCD has offered insight into the question in its Minimum Guidelines. WAC 365-190-020, the purpose section, states:

The intent of this chapter is to establish minimum guidelines to assist all counties and cities state-wide in classifying agricultural lands, forest lands, mineral resource lands, and critical areas. These guidelines shall be considered by counties and cities in designating these lands.

...

In recognition of these common concerns, classification and designation of natural resource lands and critical areas is intended to assure the long-term conservation of natural resource lands and to preclude land uses and developments which are incompatible with critical areas.... (emphasis added)

Having reviewed the dictionary definition and DCD's Minimum Guidelines, the Board holds that Mercer Island complied with RCW 36.70A.170. The City did "designate where appropriate ...

critical areas". Exhibit R-8, the Interim Regulations, comprises this designation. The Interim Regulations, through its definitions and narrative, characterize what lands constitute critical areas in Mercer Island. The Interim Regulations also protect such critical areas over the long-term. James Gutschmidt also contends that it is the City's responsibility, not individual property owners', to inventory critical areas. To support this position, he contends that Mercer Island did not comply with RCW 36.70A.180(1). RCW 36.70A.180, entitled, "Report on planning progress", provides:

- (1) It is the intent of the legislature that counties and cities required to adopt a comprehensive plan under RCW 36.70A.040(1) begin implementing this chapter on or before July 1, 1990, including but not limited to: (a) Inventorying, designating, and conserving agricultural, forest, and mineral resource lands, and critical areas; and (b) considering the modification or adoption of comprehensive land use plans and development regulations implementing the comprehensive land use plans. It is also the intent of the legislature that funds be made available to counties and cities beginning July 1, 1990, to assist them in meeting the requirements of this chapter.
- (2) Each county and city that adopts a plan under RCW 36.70A.040(1) or (2) shall report to the department annually for a period of five years, beginning on January 1, 1991, and each five years thereafter, on the progress made by that county or city in implementing this chapter. (emphasis added).

James Gutschmidt cites to a November 2, 1992, letter he received from Joe W. Willis, Mercer Island Engineer, {Exhibit P-46} for proof that Mercer Island is forcing individual property owners to designate and inventory critical areas. The relevant portion of that letter states:

Your request for the delineation of all critical areas and an inventory of those areas is summarized in the enclosed "Field Guide to Mercer Island's Critical Areas" and the "Interim Regulations for Critical Areas". Each individual property site will need to be evaluated by the project proponent for its [sic] actual site characteristics and conditions as described in the Field Guide. The City does not provide individual site inventory evaluations for prospective purchasers, such evaluations are the responsibility of the project proponent ... {Exhibit P-46}.

Mercer Island does not deny the accuracy of the Willis letter. However, the City maintains: ... that it would be virtually impossible for the City to specifically identify critical areas which exist on each parcel of property within the city.

The city has complied with the goals and requirements of the Act by identifying those areas within the city which are to be regulated as critical areas and providing a means by which an applicant or property owner can determine whether or not their property is subject to the ordinance regulating critical areas and permitting the applicant to determine the type of development regulations and standards which are applicable to this particular piece of property.

Respondent submits that there has not been a shifting of any burden since the Act does not require the city to identify critical areas on each parcel of property within the

city. (Respondent's Prehearing Brief, pp. 7 - 8.)

Although the word "inventory" or its derivative is used in several places within the GMA, it is undefined.^[12]To "**inventory**" means:

1. To make an inventory of. 2. To include in an inventory. *Webster's II New Riverside University Dictionary* 641 (1988).

In turn, the noun "**inventory**", means:

1a. A detailed list of items in one's view or possession, esp. a periodic survey of all goods and materials in stock. b. The process of making such a survey. c. The items listed in such a survey. d. The supply of goods and materials on hand: stock. 2. A survey or evaluation, as of personal characteristics. *Webster's II New Riverside University Dictionary* 641 (1988).

Pursuant to WAC 365-190-040(1):

Classification is the first step in implementing RCW 36.70A.050. It means defining categories to which natural resource lands and critical areas will be assigned.

Pursuant to RCW 36.70A.170, natural resource lands and critical areas will be designated based on the defined classifications. Designation establishes, for planning purposes: ... The classification scheme; the general distribution, location, and extent of critical areas. Inventories and maps can indicate designations of natural resource lands.

In the circumstances where critical areas (e.g., aquifer recharge areas, wetlands, significant wildlife habitat, etc.) cannot be readily identified, these areas should be designated by performance standards or definitions, so they can be specifically identified during the processing of a permit or development authorization.

Designation means, at least, formal adoption of a policy statement, and may include further legislative action. Designating inventoried lands for comprehensive planning and policy definition may be less precise than subsequent regulation of specific parcels for conservation and protection.

...

(2)(d) Mapping. Mapping should be done to identify designated natural resource lands and to identify known critical areas. Counties and cities should clearly articulate that the maps are for information or illustrative purposes only unless the map is an integral component of a regulatory scheme.

Although there is no specific requirement for inventorying or mapping either natural resource lands or critical areas, chapter 36.70A RCW requires that counties and cities planning under chapter 36.70A RCW adopt development regulations for uses adjacent to natural resource lands. Logically, the only way to regulate adjacent lands is to know where the protected lands are. Therefore, mapping natural resource lands is a practical way to make regulation effective. For critical areas, performance standards are preferred, as any attempt to map wetlands, for example, will be too inexact for regulatory purposes. Standards will be applied upon land use application. Even so, mapping critical areas for information but not regulatory purposes, is advisable.

(emphasis added).

The Board recognizes that the statute James Gutschmidt uses to support his contention that an inventory is required, is RCW 36.70A.180, entitled "Report on planning progress". Only subsection (2) discusses that subject by requiring certain cities and counties to submit reports to DCD. Subsection (1) uses the word "inventorying". The intent of this subsection is to encourage cities and counties planning under the Act to "begin implementing" the GMA on or before July 1, 1990. Nothing in this section requires cities or counties to complete inventories by a date certain. Certainly, the legislature did not mandate that inventories had to be done before critical areas were designated or interim regulations adopted.

Rather than adopting the definition of inventory that requires a minute accounting of every item in stock, the Board relies upon the second and more readily applicable definition of the term -- a survey or evaluation. This definition simply requires a jurisdiction to evaluate or survey whatever information it has available^[13] before designating critical areas and adopting critical areas interim development regulations. Nothing in RCW 36.70A.170 requires a city or county to conduct an inventory before designating critical areas; nothing in RCW 36.70A.060 requires a city or county to conduct an inventory before adopting interim development regulations. Mercer Island complied with these requirements. Moreover, this definition acknowledges DCD's recommendation for cities and counties to use performance standards or definitions in lieu of inventorying critical areas. Mercer Island utilizes both performance standards and definitions of critical areas in its interim critical areas development regulations.

Therefore, the Board holds that Mercer Island complied with the "inventory" requirements of RCW 36.70A.180(1). The use of the word "inventorying" in RCW 36.70A.180(1) could not mean a grocery store type inventory of goods in stock. The Board notes that to adopt this definition, as James Gutschmidt urges, would create an impossible requirement for many jurisdictions. Cities and counties were given from July 1, 1990 (the effective date of SHB 2929) until September 1, 1991 to designate critical areas. Jurisdictions simply could not, in such a short time, conduct the type of inventory that James Gutschmidt suggests. For local governments to conduct such an exhaustive inventory on every parcel of land within their jurisdiction would necessitate obtaining permission to enter private property from all property owners. Whether a local government could even obtain permission from absentee owners in time to adopt critical areas regulations by September 1, 1991 is questionable.

The Board holds that the process Mercer Island has adopted for requiring reports and surveys of individual applicants is in compliance with the Growth Management Act. As indicated above, the City has complied with the designation requirements of RCW 36.70A.170, the inventory requirement of RCW 36.70A.180 and the adoption of interim critical areas regulations requirement of RCW 36.70A.060(2).

The Act defines critical areas and requires the gathering of empirical facts to determine where and what type of critical areas are present with regard to specific parcels of land. However, the Act does not indicate by what method or by whom data about a given parcel of land will be gathered or analyzed for purposes of inventorying, designating or regulating critical areas. James

Gutschmidt has argued that these tasks must be undertaken by local government, at its own initiative and expense. The Board rejects this argument.

No provision of the GMA bars a city from requiring individuals to bear the cost of preparing reports and surveys, and it is a common expectation that permit applicants will bear the costs of technical studies necessitated by their development proposals. With regard to critical areas studies, it is likely that the tasks that must be performed are beyond the expertise of many local governments. This is analogous to the geotechnical or traffic engineering expertise that is often required to accompany development permit applications. Absent an application for development, it is likely that there will be no need to generate and pay for this information. As with those examples, it is most reasonable that those costs are borne by the permit applicant or property owner, rather than the general public.

The Board recognizes that an individual property owner or permit applicant may find such requirements expensive and a nuisance. If one finds such requirements to be needlessly burdensome, one's immediate recourse is with the local legislative body that enacted the requirements. If one argues that the requirements are not consistent with RCW 36.70A.020(7)⁽¹⁴⁾, one's recourse is to file a petition for review with the Board. This is an important planning goal, and the Board encourages local government to design permit processes that are timely, fair and predictable. While the Board does not agree that having an owner/applicant pay for studies violates this goal, it is incumbent upon local governments to avoid requiring information that is duplicative, confusing or not directly on point. Likewise, the Board cautions local governments to bear in mind that such studies are the means to an end, not the end itself.

Conclusion No. B-2

The City of Mercer Island complied with the requirements of the Act at RCW 36.70A.170(1) to designate critical areas; at RCW 36.70A.060(2), to adopt critical areas development regulations; and at RCW 36.70A.180(1), to begin inventorying critical areas. The City's process for complying with these requirements of the GMA relies on the extensive use of performance standards which require individual property owners to submit reports and surveys that enable city staff to determine whether critical areas exist on the property. The Board upholds this process as being in compliance with the Growth Management Act.

Legal Issue No. B-3

Does Section 19.10.030 of the Ordinance, incorporating by reference and allowing for staff modification of the Field Guide, comply with the requirements of the Act?

The Mercer Island City Code (MICC) at MICC 19.10.020 discusses the Interim Regulations, and MICC 19.10.030 discusses the Field Guide. (See Finding of Fact No. 5).

The City incorporated by reference both the Interim Regulations and the Field Guide to the Ordinance. "Incorporation by reference" means:

The method of making one document of any kind become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter the same as if it were fully set out therein. If the one document is copied at length in the other, it is called "actual incorporation". *Black's*, at 690.

James Gutschmidt challenges the last portion of MICC 19.10.030, which authorizes city staff to amend or change the Field Guide without approval of the city council. To decide whether future amendments to the Field Guide can be made by staff, the Board must examine the nature of the document and how Mercer Island characterizes the Field Guide. In the Introduction portion of the Field Guide it is characterized as a document that will aid the reader:

... in gathering important site data as you consider or actually plan development of your property. The document and its supporting regulations are in place to promote site improvements that are consistent with your goals and the overall neighborhood character. {Exhibit R-7, at p. 1; emphasis added}.

...

...This field guide is one product of the City's efforts to protect the Island's critical lands. It was prepared hand in hand with the City's site development regulations... {Exhibit R-7, at p. 2; emphasis added}.

...

As you can see, the Field Guide is used during the initial part of the development process, as an aid in preparing the site inventory. The information presented in this guidebook was designed to help prospective buyers, people interested in building or remodeling a single-family residence, and subdivision developers to identify the physical constraints of the property in question. It may be necessary for you to hire consultants, such as a *geotechnical engineer* or *wetlands biologist*, to help you complete the site inventory. The Field Guide will show you when you need this level of expertise.... {Exhibit R-7, at pp. 2 and 3; emphasis in original}.

A section of the Field Guide entitled, "What the Field Guide Contains", 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.... Each section of the guidebook explains the importance of the particular Critical Area, describes its characteristics, and establishes the information that you must submit with the application for development approval. {Exhibit R-7, at p. 4; emphasis added}.

A section, "How to Use the Field Guide", provides:

The Field Guide is designed to work hand in hand with the Interim Regulations for Critical Areas. The Field Guide helps you to determine what types of Critical Areas you may have on your property; the Regulations tell you how those areas are to be protected. By gathering the appropriate site information with the assistance of this guidebook, you will be able to prepare a site design that is coordinated with the

natural features of the property.

Using the material presented in the various sections and the appendices of the Field Guide, you will gather information that generally describes the environmental characteristics of the site.... {Exhibit R-7, at p. 5; emphasis added}.

The Field Guide will help you find out IF you have Critical Areas on your property. The Regulations will tell you HOW to protect them. {Exhibit R-7, at p. 5 - right hand margin; emphasis added}.

The Interim Regulations also refer to the Field Guide. The phrase "Critical Areas Field Guide" is defined as:

A document available at the City of Mercer Island that outlines the process for determining whether Critical Areas are present on a lot. The Field Guide is used in conjunction with the Interim Regulations for Critical Areas and serves as a roadmap for determining the site-specific regulations that apply to a lot. {Exhibit R-8; Definitions for Critical Areas; emphasis added}.

With this definition in mind, the Performance Standards indicate:

... If the site contains any of the four Critical Areas to the right, the applicable set(s) of regulations outlined there will also apply. Please refer to **A Field Guide to Mercer Island's Critical Areas** for information on identifying and protecting these areas. {Exhibit R-8; Introductory paragraph to Performance Standards; emphasis in original}.

Section I(B)(3) of the Performance Standards states that a geotechnical report must be prepared by a geotechnical engineer using the four-part Geotechnical Report found in the Field Guide. {Exhibit R-8}.

Below individual critical areas headings, which generally characterize the respective critical area, the reader is informed to refer to the Field Guide "for additional information".

Finally, Section B(4) of the General Provisions, entitled "Appeals", states:

Please refer to Appendix G of the **Field Guide** for notification and appeal requirements of this regulation. The requirements specified in the Field Guide are adopted along with these regulations and are subject to change by the City Council only. {Exhibit R-8; bold emphasis in original; underlining added}.

It is the City's position that the Field Guide:

merely sets forth a process for identifying critical areas, and elaborates on the description of the various critical areas within the city. There is no provision in the Act which prohibits a city from preparing supplementary informational material such as is contained in the Mercer Island Field Guide to Critical Areas. (Respondent's Prehearing Brief, at 8).

The Board rejects the City's argument that the Field Guide is only informational. A review of the highlighted language above from the Field Guide itself can lead to only one conclusion: that the Field Guide is more than a public relations guidebook. Instead, it is an integral and binding part of the Mercer Island critical areas protection scheme. The Mercer Island City Council obviously

recognized the importance of the Field Guide and therefore incorporated it by reference in the adopting Ordinance.

Despite this conclusion, the Board does agree with the City's position that, although RCW 36.70A.060 does not require the adoption of development regulations and a field guide, the GMA does not preclude the adoption of a such a document. Indeed, any document that assists the public in understanding land use regulations is a welcome addition to the land use planning process. Therefore, the Board concludes that local jurisdictions are free to prepare additional documents that supplement development regulations.

Whether a local jurisdiction wants to incorporate by reference a supplemental document like a field guide into a development regulation or merely distribute it independently is entirely within the jurisdiction's discretion. However, when a local jurisdiction elects to incorporate a field guide into its adopted development regulation, care must be taken. By incorporating a document by reference into an adopting ordinance, the incorporated document becomes a part and parcel of the ordinance.

Here, Mercer Island elected not only to create its Field Guide but to incorporate it by reference into its adopting Ordinance. At issue is whether staff or the city council can amend the Field Guide once it has been incorporated by reference into the adopting Ordinance. RCW 36.70A.060 (2) requires cities and counties to adopt development regulations that protect critical areas. RCW 36.70A.290(2) implicitly requires the legislative bodies of cities to adopt such regulations by ordinance, since it explicitly requires the legislative body of cities to publish "the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations".

The Board holds that under the GMA, only the legislative body of a city or county can adopt or amend development regulations.^[15] The City erred by establishing a process that allows city staff to amend the Field Guide. Because the Field Guide has become a part of the adopting Ordinance (and therefore, also of the Interim Regulations), only the city council can amend it.^[16]

Conclusion No. B-3

Local jurisdictions are encouraged (but not required) to produce guides for general distribution that assist the public in applying for permits under a critical areas regulatory system. If a local jurisdiction elects to do so, it has the discretion to attach a document such as a field guide to its ordinance that adopts interim development regulations. Whether a jurisdiction that has produced a pamphlet elects to incorporate it by reference into the adopting ordinance, or to independently distribute it, rests within the jurisdiction's discretion. However, if a document such as a field guide is specifically incorporated by reference in the adopting ordinance, it becomes a part of the ordinance. Accordingly, it has a binding effect. Although Mercer Island is free to incorporate by reference its Field Guide in its adopting Ordinance, it cannot give city staff the ultimate authority to amend the Field Guide. Only the city council can enact or amend the ordinance (or document incorporated by reference in the ordinance) that adopts development regulations required by the GMA.

Legal Issue No. B-4

Is the definition of "Critical Areas" contained in the Act at RCW 36.70A.030(5) exclusive and prescriptive?

Conclusion No. B-4

The Board previously considered this issue in the *Tracy* case and reaffirms Conclusion of Law No. 8 from the *Tracy* Final Decision and Order:

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.

Legal Issue No. B-5

If the answer to Issue No. B-4 above is affirmative, do piped watercourses and publicly and privately owned open spaces as designated by Section 19.10.010 of the Ordinance meet the definition of Critical Areas?

Conclusion No. B-5

Since the answer to Legal Issue No. B-4 is negative, the Board will not discuss this issue further.

Legal Issue No. B-6

If the answer to question No. B-4 above is negative, is that part of Section 19.10.010 of the Ordinance which designates piped watercourses and publicly and privately owned passive open spaces as Critical Areas authorized by the Act?

Conclusion No. B-6

The Board previously considered the piped watercourse issue in the *Tracy* case and reaffirms Conclusion of Law No. 9 from the *Tracy* Final Decision and Order:

"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.

The Board also previously considered publicly and privately owned passive open spaces in the *Tracy* case and reaffirms Conclusion of Law No. 10 from the *Tracy* Final Decision and Order: "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.

Legal Issue No. B-7

Did the definition of wetlands in the Ordinance comply with the requirements of the Act?

Mercer Island argued that:

There is nothing in the state law which precludes a municipality from extending the area to be regulated under the wetland characterization beyond the actual delineated wetland edge. In its definition of wetlands, the City has actually gone beyond the requirements of the Act. There is certainly no basis to argue that the definitions of wetlands within the City Ordinance does not comply with the requirements of the Act.

RCW 36.70A.170(1) directs each city to "designate where appropriate: ... (d) Critical areas." RCW 36.70A.030(5) defines "Critical areas" to "include the following areas and ecosystems: (a) Wetlands; ..." In turn, RCW 36.70A.030(17) defines "Wetland" or "wetlands" to mean:

areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities. However, wetlands may include those artificial wetlands intentionally created from nonwetland areas created to mitigate conversion of wetlands, if permitted by the county or city.

The City's Interim Regulations, in the portions entitled "Definitions for Critical Areas", defines "Wetlands" in language very similar to the statutory definition. To illustrate the differences, the following paragraph shows ~~striketroughs~~ where text from the statutory definition was deleted in the City's definition and underlining to show where the City's definition includes text not found in the statutory definition.

Areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal ~~circumstances~~conditions do support, a prevalence of vegetation typically adapted for life in saturated soil

~~conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands~~ They do not include those artificial wetlands, intentionally created from nonwetland sites, including, but not limited to, such as irrigation and drainage ditches, grass-lined swales, canals, waste water treatment facilities, farm ponds, landscape amenities, and detention facilities. ~~However, wetlands may include those artificial wetlands intentionally created from nonwetland areas created to mitigate conversion of wetlands, if permitted by the county or city. unless the artificial wetlands were created to mitigate the alteration of wetlands.~~ The boundary of a wetland Critical Area includes the area that extends 25 feet beyond the delineated wetland edge. (Italics in original).

Most of the modifications in Mercer Island's definition of wetlands delete portions not applicable in the city, or are editorial, and do not change the fundamental meaning of the statutory definition. It is clear that those portions of Mercer Island's definition comply with the requirements of the Act. The last sentence of Mercer Island's definition, however, bears closer scrutiny. It reads: "The boundary of a wetland Critical Area includes the area that extends 25 feet beyond the delineated wetland edge."

The Board first notes that departures from statutory definitions, not just of the editorial variety, but even of the substantive kind, do not constitute *prima facie* noncompliance with the Act. The Board held in *Tracy* that:

The GMA definition of "critical areas" at RCW 36.70A.030(5) is not exclusive and prescriptive.... 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.

The Board held in *Tracy* that the GMA definition of "critical areas" constitutes a minimum, and Mercer Island was therefore free to add language and even categories.

However, upon scrutinizing the last sentence of Mercer Island's definition, the Board concludes that it goes beyond the scope of the rest of the definition. The sentence deals not with the natural characteristics of the land, but simply its adjacency to lands that do exhibit wetland characteristics. The land that "extends 25 feet beyond the delineated wetland edge" certainly has a relationship to that which is delineated wetland, but, by its own terms, it is beyond the wetland. The mere fact of adjacency does not make nonwetland land into wetland. Therefore, the Board holds that the last sentence of the City's definition is not in compliance with the requirements of the Act.

This holding by the Board does not preclude the creation of buffer areas around wetlands. Wetland buffers have typically ranged in dimension from tens to hundreds of feet depending upon the class of wetland involved, site circumstances and local priorities. Regulation of land use activities or land surface modifications within such buffer areas may be appropriate, and there are at least three avenues available to the City should it choose to do so. One option is to create buffer areas under the City's general police power authority. A second is creating an ordinance pursuant to SEPA. A third option would be to identify lands adjacent to wetlands as a kind of critical area.

In order to do so, the City would have to define the buffer and justify why it constitutes a critical area. Then the City would designate this land under the authority of RCW 36.70A.170 and protect it under the authority of RCW 36.70A.060.

Conclusion No. B-7

The definition of "wetland" in Mercer Island's Ordinance complies with the Growth Management Act, with the exception of the last sentence.

Legal Issue No. B-8

Did the City comply with public participation and public notice requirements of the Act in adopting the Ordinance?

The Board has previously determined that Mercer Island was not required to comply with the enhanced public participation requirements of RCW 36.70A.140 in enacting interim development regulations pursuant to RCW 36.70A.060. (see *Tracy v. Mercer Island*, Conclusion of Law No. 4, at p. 13). Although public notice is also discussed in RCW 36.70A.140, the Board reaffirms its *Tracy* decision that RCW 36.70A.140 does not apply to interim development regulations. Whether Mercer Island complied with public notice provisions of the GMA was not an issue before the Board in *Tracy*. "Notice" is discussed elsewhere in the Act at RCW 36.70A.290(2) which provides:

All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter must be filed within sixty days after publication by the legislative bodies of the county or city. The date of publication for a city shall be the date the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations, or amendment thereto, as is required to be published. Promptly after adoption, a county shall publish a **notice** that it has adopted the comprehensive plan or development regulations, or amendment thereto. The date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto. (emphasis added).

The provision that a county must publish a notice obviously does not apply to the city. However, Mercer Island is required to publish the ordinance adopting the development regulation or a summary of it. This constitutes the public notice requirement of the GMA that does apply to interim critical areas regulations. Evidence in the record reveals that Mercer Island complied with this provision by publishing the adopting Ordinance. (See Exhibit P-8)

Conclusion No. B-8

The Board previously considered the applicability of public participation requirements to critical areas development regulations in the *Tracy* case and reaffirms Conclusion of Law No. 4 from the *Tracy* Final Decision and Order:

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.

Furthermore, Mercer Island did comply with the public notice provision of the Growth Management Act, RCW 36.70A.290(2), that is applicable to interim development regulations by publishing the adopting Ordinance.

Legal Issue No. B-9

Did the City comply with statutory requirements for publication of the Ordinance, when it failed to publish the "Field Guide" as part of the Ordinance?

As indicated in the discussion of Issue No. B-8, Mercer Island published the adopting Ordinance in its entirety. {see Exhibit P-8}. However, the City did not publish the Field Guide or Interim Regulations which were incorporated by reference into the adopting Ordinance. James Gutschmidt alleges that the City failed to comply with the GMA because it did not publish the Field Guide. The purpose of notice statutes generally 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). In this instance, the purpose of RCW 36.70A.290(2), in addition to informing the public that an ordinance had been adopted, is to provide notice of the adoption of the ordinance so that a specific date is triggered from which an appeal to a growth planning hearings board can be made. This GMA notice provision is not intended to alert the public about an impending legislative hearing. Other statutes besides the GMA reveal the requirements for this type of notice.

As previously discussed in this document, the Board does not have jurisdiction to determine whether "other statutes" have been violated. The Board's jurisdiction is limited to those matters listed in RCW 36.70A.280(1). The Board holds that Mercer Island complied with the notice provisions of RCW 36.70A.290(2) despite the fact that the Field Guide and Interim Regulations were merely referenced and not published in their entirety or even summarized. Publishing the adopting Ordinance verbatim suffices to meet the purpose of RCW 36.70A.290 notice; this notice by publication alerted potential petitioners that they had sixty days in which to file a petition for review.

Conclusion No. B-9

The City of Mercer Island complied with RCW 36.70A.290(2) by publishing the adopted

Ordinance in its entirety. The fact that the Field Guide or the Interim Regulations were not published in their entirety or summarized does not constitute noncompliance with the Growth Management Act. The notice that the City published achieved the GMA's goal of alerting potential petitioners that an ordinance had been enacted so that they could appear before a growth planning hearings board .

Legal Issue No. B-10

Did the City comply with SEPA, Chapter 43.21C RCW, in adopting the Ordinance?

James Gutschmidt alleges that the SEPA Environmental Checklist that Mercer Island issued misleads the public. He points out that the Performance Standards apply to all development within the City. In contrast, in answering item 11 of the Environmental Checklist, the City stated:

Interim regulations are applicable throughout the city & will be applied to specific single family dwelling[s] & subdivisions that meet interim critical areas definitions.

{Exhibit R-2 at p. 2 of checklist}.

The Board agrees that this language is certainly not the model of clarity. Viewed alone, it is open to varying interpretations. Some might read the language "applicable throughout the city" to mean that the Interim Regulations apply to all types of development; others could rely on the language "applied to specific single family dwelling" to conclude that the Interim Regulations apply only to single family dwellings. However, one cannot read just one portion of a SEPA document alone. Instead, the entire document must be considered.

The Board notes that the City's response to Environmental Checklist item 12 was that the location of the proposal was the "entire city". Furthermore, in response to Part D - Supplemental Sheet for Nonproject Actions, item 4, the City indicated that the proposal would affect:

All future development (public and private) that (sic) situated in a defined "critical lands area" may be influenced by the new regulations... {Exhibit R-2 at p. 50; emphasis added}.

The Board also finds that the Environmental Checklist is replete with references to the Interim Regulations and the Field Guide. These latter two documents make it clear that all development within the City is impacted, not just single family residences.

The Board concludes that, when looked at as a whole -- including references to the underlying Interim Regulations and Field Guide, the SEPA documents in this case were not misleading. The package of information would have fairly apprised a reasonable person of the nature and character of the proposed Interim Regulations so that intelligent preparation could take place for upcoming hearings on the proposal. (case citations omitted; see Discussion of Issue No. 6 in *Tracy*).

Conclusion No. B-10

The Determination of Nonsignificance and accompanying Environmental Checklist (and Part D,

Supplemental Sheet for Nonproject actions) issued by Mercer Island in this case complied with SEPA; although specific portions of the Environmental Checklist were not the model of clarity, when viewed as a whole, including the proposed Interim Regulations and Field Guide, the package of information was not misleading.

Legal Issue No. B-11

If the answer to Issue No. A-2 above is affirmative, are there any provisions in the Act that prohibit a local jurisdiction from enacting regulations which exceed the requirements of the Act?

Conclusion No. B-11

The Board answered Legal Issue No. A-2 affirmatively. Refer to the discussion of Legal Issues A-2, B-4 and B-6 above.

Legal Issue No. B-12

If provisions in the Act do prohibit a local jurisdiction from enacting regulations beyond the requirements of the Act, what is the effect if a local jurisdiction has exceeded the limit?

Conclusion No. B-12

The Board answered Legal Issue No. A-2 affirmatively. Refer to the discussion of Legal Issues A-2, B-4 and B-6 above. If the Board determines that an action of a local jurisdiction does not comply with the goals and requirements of the Growth Management Act, it will remand the matter to the local jurisdiction.

Legal Issue No. B-13

Did the designation of geologically hazardous areas as critical areas comply with the requirements of the Act for such areas?

The responsibility to designate critical areas is found at RCW 36.70A.170(1)(d). The definition of "critical areas" at RCW 36.70A.030(5) includes (e) geologically hazardous areas. The latter term is defined in subsection (9) in the same section:

"Geologically hazardous areas" means areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns.

DCD's Minimum Guidelines discuss classification of geologically hazardous areas at WAC 365-

190-080(4)(a). Generally, such areas would be those susceptible to erosion, landslides, earthquakes, or other specified geologic events. Because of such characteristics, geologically hazardous areas pose a threat to health and safety from incompatible development. The Minimum Guidelines, in subsection (b), further note that it is advisable to classify such hazardous areas according to degree of risk, and comment in subsection (a) that technology cannot reduce risks to acceptable levels in all cases. Subsection (d) provides further detail on identification of landslide hazard areas, using a combination of geologic, topographic and hydrologic factors, and specifically lists factors of susceptibility including bedrock, soil, slope (gradient), slope aspect, structure, and hydrology. A list of examples of such areas is included at 365-190-080(4)(d)(ii). The City's consultant, consistent with the City's decision to develop a performance-based rather than prescriptive development regulation, first determined whether those hazards listed in the Act and Minimum Guidelines existed on Mercer Island, and made recommendations on how these areas could be classified and what regulatory provisions should be made. In its "Recommended Classification Scheme and Regulatory Suggestions"^[17], the consultant concludes:

The slopes of Mercer Island are obviously a factor in Geologic Hazardous Areas. There are cases where development is occurring on slopes that are greater than 40%. Although it may be possible to develop these sites with some sound engineering, it is recommended that Mercer Island carefully consider future proposals on these slopes. In areas that are deemed to be high erosion, high landslide, and/or high seismic hazardous areas, steep slopes are extremely hazardous. In the areas of the island that slope and other potential geologic hazards exist, a classification scheme that regulates development on >15% and >30% slope is appropriate. By tightening up the regulations in areas of moderate to high slope, Mercer Island lessens the possibility of property damage.

The Interim Regulations define the following material terms:

Critical Areas. 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.

Critical Slope. Area(s) of land where the slope is 30% or greater. Critical slope is determined by measuring the vertical rise over any 40-foot horizontal run for a specific area that results in a percentage of 30 or more. The critical slope hazard area includes the area of land that extends for 10 feet from the *Top and Toe of the Slope*. Critical slopes may cross property lines.

Geologic Hazard Areas. Areas susceptible to erosion, sliding, earthquake, or other geological events based on a combination of slope (gradient or aspect), soils, geologic material, hydrology, vegetation, or alterations. [See Geologic Hazard Areas, I.A.] {Exhibit R-8; Italics in original; emphasis added}

The Interim Regulations describe "Geologic Hazard Areas" as follows:

These Critical Areas are characterized by lot slope, soil type, geologic material and

groundwater which may combine to create problems with slope stability, erosion, and water quality during and after construction or during natural events such as earthquakes or excessive rainstorms...." {Exhibit R-8; emphasis added}

Subsection I of the Interim Regulations sets forth General Requirements And Delineations, described as serving to "...identify and document Critical Areas on a site.They include technical reports and surveys, temporary field marking, and depicting Critical Areas on single lots and subdivisions." {Exhibit R-8}The text of subsection I.A. indicates that the determination of the presence of a geologic hazard area on a site will be based on, among other factors, a Geotechnical Report as described in the Field Guide.

The Field Guide, at p. 14, requires all applicants to submit a geotechnical report prepared by a licensed geotechnical engineer.However, the city may waive the report requirement for sites with slopes of less than 15%.^[18]The report is to consist of an evaluation, including site information, determination of significant geologic hazards, statement of support of determination, and geotechnical report checklist.Appendix B of the Field Guide provides the checklist form and more detailed instructions.(See Exhibit R-7)

In his Amended Petition for Review dated Oct. 9, 1992, James Gutschmidt argues that:

Ordinance A-96 arbitrarily regulates steep slopes....While steep slopes may be one factor in determining whether an area is geologically hazardous, Ordinance A-96 regulates areas strictly by slope.Moreover, Ordinance A-96 regulates all slopes and non-slopes, far beyond the delegation of authority given by the Growth Management Act.

The Board finds that the GMA definition is based on the premise that the threat of slides, erosion, or earthquake damage may render some sites unsuitable for development, because of health or safety risks which may arise from such development, and the DCD Minimum Guidelines focus on identification of the type of geologic hazard(s) located on a specific site, and the severity of risk such hazards may impose.The City has elected to use a classification method for geologic hazard areas that includes slope steepness as a factor in determining whether or to what extent site examination and development controls will be required.In addition the City, in reviewing a development application, will consider soil composition, geologic material, groundwater conditions and vegetation (as appropriate).

Conclusion No. B-13

In designating geologically hazardous areas as critical areas, the City complied with the requirements of the Act at RCW 36.70A.170(1)(d).

Legal Issue No. B-14

If the answer to Legal Issue No. A-3 above is affirmative, does the Ordinance violate Amendments 1, 5, 13 and/or 14 of the United States Constitution?

Conclusion No. B-14

Since the Board concluded that it does not have jurisdiction to determine whether federal and state constitutions have been violated, the Board will not discuss this issue.

Legal Issue No. B-15

If the answer to Legal Issue No. A-3 above is affirmative, does the Ordinance violate Article I, Section 16 of the State Constitution?

Conclusion No. B-15

Since the Board concluded that it does not have jurisdiction to determine whether federal and state constitutions have been violated, the Board will not discuss this issue.

D.ORDER

Having reviewed the exhibits and briefs, having heard the arguments of the parties, and having entered the foregoing Findings of Fact and Conclusions, the Board enters the following order: Mercer Island Ordinance A-96 and the documents incorporated by reference in it (the Interim Regulations for Critical Areas and the Field Guide), are in compliance with the goals and requirements of the Growth Management Act except for the following provisions:

1. The last sentence of the Mercer Island definition of wetlands, as stated in the "Definitions for Critical Areas" portion of the Interim Regulations and in Appendix C-4 of the Field Guide, is remanded with instructions for the City to delete it or otherwise bring it into conformance with the Board's findings, holdings and conclusions.

2. MICC 19.10.030 of the adopting Ordinance is remanded, with instructions for the City to amend it to:

- a. delete reference to the City staff's ability to make future amendments or changes;
or
- b. specify that City staff has the ability only to make recommendations for future amendments or changes to the Field Guide; or
- c. delete reference to the Field Guide altogether in the adopting Ordinance and Interim Regulations. Although the Field Guide would not be a part of the Ordinance or Interim Regulations, it would still be a useful tool to assist the public when dealing with Mercer Island's Critical Areas Development Regulations; or
- d. insert a clause into the adopting Ordinance, the Field Guide itself and the Interim Regulations clearly indicating that the Field Guide is a non-binding document published as a guide to assist the reader in understanding the binding documents: the

Interim Regulations and the adopting Ordinance; or
e. otherwise comply with the Board's findings, holdings and conclusions regarding
this issue.

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 July 16, 1993.**

DATED this 16th day of March, 1993.

CENTRAL PUGET SOUND GROWTH PLANNING HEARINGS BOARD

M. Peter Philley
Board Member

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.

Appendix 1

PROCEDURAL HISTORY OF THE CASE

On April 23, 1992, James C. Gutschmidt, Ralph Gutschmidt and William H. Wright transmitted a
letter to the Washington State Department of Community Development, Growth Management
Division, (DCD) by registered mail and telefacsimile. The letter, entitled "Petition and request for
remedy in accordance with RCW Chapter 36.70A Section 36.70A.280," alleged that the Critical
Areas Ordinance adopted by the City of Mercer Island (Mercer Island or the City) was in
violation of the Growth Management Act (GMA or the Act), and requested a hearing on the
petition.

On May 15, 1992, the Central Puget Sound Growth Planning Hearings Board (the Board) began
operations at a temporary office in Seattle. On May 27, 1992, the Board, acting jointly with the
Eastern Washington and Western Washington Growth Planning Hearings Boards, filed notice
with the Washington State Code Reviser's Office of its intent to adopt Emergency Rules of
Practice and Procedure, solicited public input, and designated a rules coordinator who could be
contacted for such input. That notice was published in the June 17, 1992 edition of the
Washington State Register, Issue 92-12. The Boards, acting jointly, adopted Emergency Rules on
June 16, 1992; and filed the Rules with the Code Reviser on June 17. The Regulation, WAC 242-

02, took effect on June 17, 1992. Notice of adoption was published in the Washington State Register, Issue 92-14. On July 15, 1992 the Board took occupancy of its Seattle office. Phones were installed on July 16, and Directory Assistance first responded to inquiries concerning the phone number on or about July 24.

On August 10, 1992, DCD transmitted to the Board a copy of James Gutschmidt's April 23 letter petition. On that same day, the Board sent James Gutschmidt a letter stating that it had received the letter petition, and that it had not previously seen the document; informed him that the Board had established an office and adopted Emergency Rules of Practice and Procedure, effective June 17, 1992; enclosed a copy of those rules; and directed him to conform the above referenced letter petition with the Emergency Rules. It also mentioned the time limits established in the Rules for the filing of a petition.

On September 17, 1992, James C. Gutschmidt filed a Petition for Review with the Board. Unlike the April 23 letter petition, which was signed by James C. Gutschmidt, Ralph Gutschmidt and William H. Wright, the petition was only signed by James Gutschmidt.

On September 28, 1992, the Board's presiding officer sent a letter to the parties in compliance with RCW 36.70A.290(3), notifying them that the hearing on the Petition for Review would be held on December 9, 1992, and setting a Prehearing Conference for October 26, 1992.

On October 9, 1992, James Gutschmidt filed an amended Petition for Review with the Board, which raised additional issues and expanded upon the arguments in support of the issues raised in the September 17 filing. Again, James Gutschmidt was the sole signator.

On October 14, 1992, James Gutschmidt filed a Motion for Default Judgment for Mercer Island's failure to timely file its Index of Materials.

On October 15, 1992, Mercer Island filed its Index of Materials.

On October 19, 1992, Mercer Island filed its Designation of Index of Materials.

On October 19, 1992, James Gutschmidt filed a "Motion for Declining to Permit the Appearance of Ron Dickinson before This Board".

On October 21, 1992, Mercer Island filed its Answer to Petition.

On October 21, 1992, Mercer Island filed a Motion to Dismiss for Failure to Comply with Requirements for Timely Filing and Contents of Petition.

On October 26, 1992, Mercer Island orally presented a Motion to Disqualify Ralph Gutschmidt and William Wright.

On October 26, 1992, Mercer Island orally presented a Motion to Continue the Hearing.

On October 26 and 27, 1992, the Board held a prehearing conference to determine the issues and evidence to be considered at hearing, and to hear arguments on Mercer Island's Motion to Continue the Hearing.

On October 27, 1992, James Gutschmidt filed a Motion for Admission of Supplemental Evidence not Included in Index of Materials

On October 30, 1992, the Board issued a Prehearing Order which rescheduled the hearing to December 16, 1992; set a motions hearing for December 2, 1992; listed James Gutschmidt's and Board raised issues to be heard; and established deadlines for submittal of exhibit and witness

lists, completion of discovery, and submittal of briefs.

On November 6, 1992, James Gutschmidt filed an Objection to Hearing Order, which the Board deemed to be a motion.

On November 6, 1992, James Gutschmidt filed a "Motion to Compel Mercer Island to File Complete Index of Materials and Supplemental to Default Judgment Motion".

On November 6, 1992, James Gutschmidt filed a Motion for Intervenor Status for William Wright and Ralph Gutschmidt.

On November 9, 1992, Mercer Island filed a Motion to Dismiss Petition for Failure to Comply with Petition Content Requirements of the Growth Management Act and the Board's Rules, WAC 242-02-210(2)(c).

On November 9, 1992, Mercer Island filed a Motion to Dismiss Petition for Failure to Comply with Petition Content Requirements of the Board's Rules, WAC 242-02-210(2)(g).

On November 9, 1992, Mercer Island filed a Motion to Dismiss for Failure to Comply with the Requirements for Timely Filing in the Growth Management Act.

On November 9, 1992, Mercer Island filed a Motion to Dismiss for Failure to Comply with the Requirements for Timely Filing in the Board's Rules.

On November 9, 1992, Mercer Island filed a Motion to Disqualify Ralph Gutschmidt and William Wright as Parties for Failure to Sign the Petition for Review.

On November 9, 1992, Mercer Island filed a Motion to Dismiss for Failure of the Board to Issue a Final Decision Within the Time Limits Prescribed by the Act (if the Board finds that the April 23, 1992 Letter Petition to be a valid petition).

On November 9, 1992, Mercer Island filed a Motion to Dismiss Board Issue No. A-1 of the Prehearing Order for Lack of Jurisdiction.

On November 9, 1992, Mercer Island filed a Motion to Dismiss Board Issue No. A-3 of the Prehearing Order for Lack of Jurisdiction.

On November 9, 1992, Mercer Island filed a Motion to Dismiss James Gutschmidt's Issue No. B-14 of the Prehearing Order for Lack of Jurisdiction.

On November 9, 1992, Mercer Island filed a Motion to Dismiss James Gutschmidt's Issue No. B-15 of the Prehearing Order for Lack of Jurisdiction.

On December 2, 1992, the Board held a Motion Hearing on the motions by James Gutschmidt and Mercer Island listed above. Having reviewed the motions and responses to motions, and having considered the arguments of the parties, the Board issued an order on December 31, 1992 as follows:

The Board denied Mercer Island's three Motions to Dismiss for James Gutschmidt's failure to comply with the time requirements of the Act and the Board's regulations; it accepted James Gutschmidt's appeal dated September 17, 1992 as timely filed; and having determined that the latter date controlled the required date of issuance of the Board's final order, it dismissed a fourth Motion to Dismiss by Mercer Island, for its failure to meet the 180 day deadline. A fifth related motion, by Mercer Island, challenged the standing of William Wright and Ralph Gutschmidt as parties, since the controlling Petition for Review was not signed by them. It was granted.

The Board found that the September 17, 1992, filing was valid; that James Gutschmidt had substantially complied with the requirements of the Act and the Board's Regulations; and that as modified by an Amended Petition filed on October 9, 1992, that petition would control this appeal. Therefore, the Board denied Mercer Island's three Motions to Dismiss for James Gutschmidt's failure to comply with requirements of the Act and the Board's regulations specifying contents of the petition for review, and requiring a statement of the truth of the contents, filed November 9, 1992. It further determined that Mercer Island's Motion to Dismiss, dated October 21, 1992, encompassed the same issues addressed by the three subsequently filed motions, and would not be considered further.

The Board, in response to Mercer Island's motion to dismiss an issue raised by the Board, concluded that it lacked jurisdiction to consider whether the City's action complied with statutes other than the Growth Management Act and the State Environmental Policy Act (SEPA). It deferred entering an Order to that effect until this Final Decision and Order was entered.

The Board, concluding that it lacked jurisdiction to consider federal and state constitutional issues, granted three motions by Mercer Island to dismiss issues concerning freedom of speech and religion, takings and substantive due process.

Having dismissed William Wright and Ralph Gutschmidt as parties, the Board found that they met the requirements of intervenors as set forth in the Board's Rules, and granted their Petition for Intervention.

The Board denied James Gutschmidt's Motion for default judgment, which charged that Mercer Island failed to file its Index of Materials within the time prescribed by the Board's Emergency Rules of Practice and Procedure, noting that the filing date did meet the extended deadline in the Board's Permanent Rules, which took effect within a week of the earlier established deadline. The Board then denied two Motions by James Gutschmidt, for admission of supplemental evidence not listed on the Index of Materials, and for default judgment for failure to file a complete index, or alternatively to require Mercer Island to file a complete Index. It admitted certain exhibits, and determined that others could be offered into evidence at the Petition hearing. It did not allow witnesses at the hearing.

On December 31, 1992, the Board rescheduled the hearing to January 21, 1993, based on a request by James Gutschmidt.

On January 8, 1993, Intervenors moved to delay the hearing to February 17, 1993, and to modify deadlines for discovery and filing of exhibits and briefs accordingly.

On January 12, 1993, Mercer Island filed a Prehearing Brief; on January 15, 1993, James Gutschmidt and Intervenors each filed a Prehearing Brief. On January 20, 1993, James Gutschmidt and Intervenors each filed a Response to Mercer Island's Prehearing Brief.

On January 13, 1993, the Board denied the Intervenor's motion to delay the hearing and deadlines.

On January 13, 1993, Mercer Island filed a Designation of Exhibits, listing eight documents. On January 15, 1993, James Gutschmidt filed a Designation of Exhibits, listing forty-seven documents. James Gutschmidt's list differed in several particulars from the list in the Board's

Order on Prehearing Motions.

On January 21, 1993, the Central Puget Sound Growth Planning Hearings Board, M. Peter Philley, Joseph Tovar, and Chris Smith Towne, presiding, held a hearing on the merits of Case No. 92-3-0006 at the Seattle facilities of the Mountaineers Club. Petitioner James C. Gutschmidt and Intervenors Ralph Gutschmidt and William H. Wright appeared *pro se*; Ron Dickinson appeared for Mercer Island. Duane W. Lodell, Robert H. Lewis & Associates, Tacoma, provided court reporting services.

At the commencement of the hearing, the Presiding Officer directed James Gutschmidt to offer each of the forty-seven documents listed in his Designation of Exhibits, and with the agreement of Respondent, admitted them into evidence. They are identified with the prefix P-. The Board not having possession of Exhibit P-47, the Presiding officer directed Petitioner to deliver it, and he did so deliver it, to the Board on January 26.

Gutschmidt then offered three additional exhibits: a Planning Commission Agenda; a consultant issues paper; and city council meeting tapes. They were identified as P-48, -49, and -50 respectively, and admitted. He was directed to and did submit the exhibits to the Board's office on January 26.

Mercer Island's Exhibits R-1 through R-8 were admitted in accordance with the December 31, 1992, Order on Prehearing Motions.

Certain exhibits listed on Respondent's Index and identified by James Gutschmidt pursuant to the Board's Rules and admitted by the Board's Order on Prehearing Motions, were not on Petitioner's or Respondent's Final Exhibit Lists; six were offered by Petitioner at the hearing. The City objected to admission of the exhibits, preliminarily identified as P-61, -62, -63, and -64, and the Board determined that it would take notice of these documents, rather than admit them into evidence. P-65 and -66 were withdrawn by Gutschmidt.

The Board directed Mercer Island to produce all available Planning Commission agendas relating to Ordinance A-96, and designated them as Exhibit P-67. The City delivered the documents to the Board on January 26.

No testimony was allowed at the hearing.

The Board took official notice of RCW 36.70A.040 (Growth Management Act), RCW 35A.13.200 (Optional Municipal Code), the Federal and State Constitutions, and Chapter 173 WAC (Washington Administrative Code); and a taped record of the Board's Prehearing Conference in Case No. 92-3-0001.

The Presiding Officer orally ordered Petitioner to supplement the record with Exhibits P-48, -49, -61, -62, -63, -64 and -67. Petitioner complied by filing an Addendum to the Designation of Exhibits with the Board on January 26, 1993.

^[1]Pursuant to WAC 242-02-040(1) "Act" means Chapter 17, Laws of 1990 1st ex. sess. and Chapter 32, Laws of 1991 1st sp. sess., and subsequent amendments.

^[2]As pointed out in the *Snoqualmie* decision, the legislature might wish to examine whether growth planning hearings boards should obtain broader jurisdiction. Just as the boards currently have jurisdiction over SEPA issues

related to GMA actions, so too might they be given jurisdiction over "other" statutes if the underlying action relates to the GMA. For instance, if a local jurisdiction failed to comply with its public notice provisions found in "other" statutes, under the existing GMA, the Board has no jurisdiction. However, with legislative approval, the Board could review such an "other" statute and determine whether the local government complied with it, so long as the underlying matter (e.g., adoption of a regulation by ordinance) is related to the GMA.

^[3] WAC 365-190-040 refers to development regulations required by RCW 36.70A.060 as "interim regulations".

^[4] RCW 36.70A.060(3) specifically refers to development regulations that are adopted after enactment of a comprehensive plan as "implementing development regulations".

^[5] RCW 36.70A.370(1) required the state attorney general to establish an orderly, consistent process that would enable state agencies and local governments to *evaluate* a proposed regulatory action to assure that it does not constitute an unconstitutional taking of private property. Subsection (3) requires local jurisdictions to *utilize* the process the attorney general developed. Subsection (1) directed the attorney general to establish this process by October 1, 1991. A document entitled *State of Washington Attorney General's Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property* (the Recommended Process) {Exhibit P-23; also attached to AGO 1992, No. 23} is the result of that process. However, it was not completed until February, 1992. Mercer Island adopted the Ordinance on February 24, 1992. Therefore, the document the City was required to *utilize* may not have existed by the time it enacted the Ordinance. Mercer Island cannot be penalized for not waiting to utilize the Attorney General's process (which was distributed four months after its deadline) when it (the City) had its own deadline to meet (i.e., the March 1, 1992 deadline for adopting interim development regulations [see RCW 36.70A.060(2), which established a September 1, 1991 deadline, and RCW 36.70A.380, which authorized deadline extensions of up to 180 additional days; see also Exhibits P-33, 34 and 35]. Finally, even if the Recommended Process had been established in time to assist Mercer Island, it provides:

A private party, however, does not have a cause of action against an agency for failure to utilize the recommended process. The Act also provides that "The process used by government agencies shall be protected by attorney client privilege. [see also RCW 36.70A.370(4)].

^[6] Pursuant to RCW 36.70A.320, the Board is required to consider DCD's procedural criteria in making its determination whether a local action is in compliance with the GMA. RCW 36.70A.190(4)(b) directed DCD to adopt procedural criteria to assist counties and cities in adopting comprehensive plans and development regulations that meet the goals and requirements of the GMA. The criteria are to reflect regional and local variations and the diversity that exists among different counties and cities that plan under the Act. Procedural criteria were adopted as Chapter 365-195 WAC on October 29, 1992 and became effective on December 18, 1992 (i.e., 31 days after they were filed on November 17, 1992), long after the September 1, 1991 (or the March 1, 1992 extension) deadline for adopting interim regulations. Therefore, the Procedural Criteria do not apply to Mercer Island's adoption of interim critical areas development regulations.

The legislature also required DCD to adopt guidelines to guide the classification of critical areas. (RCW 36.70A.050 (1)). Pursuant to RCW 36.70A.050(3), these "minimum guidelines" also are to allow for regional differences that exist in Washington. The intent of the guidelines is "... to assist counties and cities in designating the classification of ... critical areas under RCW 36.70A.170". DCD's Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas (Minimum Guidelines) became effective on April 15, 1991, and are found at Chapter 365-190 WAC. However, the Minimum Guidelines do not mention the relationship of the GMA's planning goals to interim development regulations. Instead, the second paragraph of WAC 365-190-040 only refers to counties and cities adopting comprehensive plans by July 1, 1993, that are "... consistent with the goals of the act."

^[7] RCW 36.70A.290(2) provides that:

All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto is in compliance with the goals and requirements of this chapter must be filed within sixty days... (emphasis added).

^[8] The current language of RCW 36.70A.060(2), effective July 16, 1991, indicates that the purpose is to "protect" critical areas. This was a result of 1991 amendments to the Act. Originally, the purpose of interim critical areas

regulations was to "preclude" land uses or development that is incompatible with critical areas. (See 1990 1st ex.s. c 17 §6.)

^[9]AGO 1992 No. 23, at 8.

^[10]See, for example, Finding of Fact Nos. 2(l) and 3(g).

^[11]This entire process was also described in the Field Guide. Although the Performance Standards and Interim Regulations {Exhibit R-8} discuss a "Stormwater Control Management Plan", the Field Guide narrative does not mention such a plan. However, a Stormwater Control Management Plan is included in the Field Guide's definition of the terms "reports and surveys". {See Exhibit R-7, the Field Guide; Appendix C, p. C-3}.

^[12]See also RCW 36.70A.070(2)(a), (3)(a), (6)(b)(i) and RCW 36.70A.190(3) and (4).

^[13]A non-inclusive list of information available might include: Soil Conservation Service, U.S. Geological Survey, and Federal Emergency Management Agency documents; shoreline master programs; aerial photographs, pre-existing environmental impact statements and soils or geotechnical reports prepared for development permit applications.

^[14]RCW 36.70A.020(7) states: "Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability."

^[15]See also the Board's *Snoqualmie* decision where the Board held that only the King County Council and not the King County Growth Management Planning Council could adopt or amend countywide planning policies.

^[16]The Board notes the distinction between staff amending the adopting Ordinance (and its incorporated attachments) and staff *administering* and *enforcing* the Ordinance. While only the city council can adopt, staff is expected to administer and enforce the ordinance. Therefore, staff can routinely make determinations or pass judgment as to whether a specific parcel of property includes critical areas or whether the desired permit should be issued. If an applicant disagrees with the staff decision, appeals procedures are outlined in the Interim Regulations and Field Guide.

^[17]The Board takes notice of *Tracy* Exhibit R-1, p.8.

^[18]The Board notes that the Performance Standards at I.B.3.b. indicate that the report can be waived on sites with less than 20% slope.