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WASHINGTON LAND USE LAW AND CLIMATE CHANGE

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## 1. INTRODUCTION

Climate change will profoundly alter Washington law use law. We are at a place not unlike the time period 37 years ago, when the State Environmental Policy Act wrought a sea change in land use. Climate change is likely to do the same. Climate change will alter building standards and how communities are designed. It is already starting to. This article assesses Washington's rapidly changing legal landscape, as it relates to climate change and land use.

## 2. STATE ENVIRONMENTAL POLICY ACT

### 2.1 Requirements

The State Environmental Policy Act ("SEPA", Chapter 43.21C RCW) is the state's overarching environmental review statute. Before a government agency takes a non-exempt action, it must assess its adverse environmental impacts. SEPA was designed, in part, "to promote efforts which will prevent or eliminate damage to the environment and biosphere."<sup>1</sup> Climate and air are designated environmental elements.<sup>2</sup> Most projects have not systematically addressed climate change,<sup>3</sup> but many are starting to.

#### 2.1.1 Agencies Now Requiring Greenhouse Gas Impact Disclosure

King County was the first Washington jurisdiction to specifically require all non-exempt projects to review greenhouse gas impacts through SEPA. City of Seattle projects now face similar requirements.<sup>4</sup>

#### 2.1.2 Agency Guidance

The State Department of Ecology is expected to issue guidance on SEPA and climate change, and ultimately, regulations. King County has developed a Greenhouse Gas Emissions Worksheet and Information Bulletin 26. Bulletin 26 identifies key ways development "can contribute to climate change" and issues to address in developing a project's "carbon footprint."<sup>5</sup> The Worksheet identifies key issues to account for in calculating the footprint:

- The extraction, processing, transportation, construction and disposal of materials and landscape disturbance (Embodied Emissions)
- Energy demands created by the development after it is completed (Energy Emissions)
- Transportation demands created by the development after it is completed (Transportation Emissions)

Applicants are to fill out the County's worksheet, and attach it to the Checklist.

Applicants select the use category (i.e. office; retail; single-family home; apartments with two-four units), then multiply building square footage by pre-calculated multipliers. Pavement emissions are similarly estimated. The resulting numbers are computed as metric tons of carbon dioxide equivalence.<sup>6</sup> If analytical support is provided, an applicant may utilize another model, and depart from the County's standardized approach.<sup>7</sup>

The worksheet is easy to fill out. However, as King County recognizes, there are numerous factors the calculations do not account for, and the methodology will be revised over time. For example, the model does not account for project location in relation to other uses, street-grid lay-out, and other factors impacting vehicle miles traveled. The County is working to address these issues in its development regulations.

An alternative, incentive based approach, would be to develop a "best practices safe harbor," as SEPA authorizes in RCW 43.21C.240, and as discussed in Section 2.3 below. King County has been exploring a related approach, by utilizing a "Green List." The Green List would include sets of standards. If complied with, a project would automatically be deemed to have adequately addressed climate change issues. LEED and the Master Builders' Built Green programs are among the standards being considered.

### 2.1.3 Mitigation Strategies

King County is in the process of designing mitigation in its comprehensive plan and development regulations. Policies proposed address a range of issues, including:

- Sustainable Development Practices: "King County shall encourage, support and promote the application of sustainable development practices.... This may be accomplished through working with residential and commercial developers to reduce impervious surface areas, protect ground and surface water within a watershed, assure that habitat protection needs are incorporated into development proposals to the extent possible, incorporate greater use of green building materials and utilize systems that conserve or reuse resources, including those that use energy more efficiently. King County shall provide technical assistance and incentives for the use of sustainable development practices for private sector development, and shall collaborate with the private sector on potential future regulatory tools."<sup>8</sup>
- Regulations: "King County shall identify and evaluate potential changes to land use development regulations and building codes to support and promote green building and low impact development."<sup>9</sup>
- Soils/Carbon Storage Properties. Policy language provides for leaving soils and vegetation as undisturbed as possible during construction. When removal is necessary, stockpiling and re-using soils on site is to be done to the extent possible.<sup>10</sup>

A wide range of mitigation strategies are expected to be identified in King County's draft regulations, which should be available for public comment on April 25.

Another mitigation approach can be found in Massachusetts, the first state to require environmental review documents to assess greenhouse gas impacts. The state's Executive Office

of Energy and Environmental Affairs, issued a “FAQ” sheet, which identifies the following “well-recognized emissions reduction measures:”

- Energy efficiency improvements in buildings, including: lighting, energy management systems, insulation, HVAC technology, windows, water heating technology, roofing and other building materials;
- Layout of the site and building orientation to make the best use of natural light, natural heating and cooling, and solar energy potential;
- Incorporation of low impact development techniques (including green roofs) to reduce the amount of asphalt and provide greater shading;
- Transportation demand management, including locating the project near mass transit, access to shuttle or bus service (preferably using alternative fuels), ridesharing programs, bicycle and pedestrian accommodations, provision of Zip Car spaces;
- On-site renewable energy and combined heat and power generation;
- Use of clean and alternative fuels; and
- Systems for on-site reuse and recycling of construction and demolition materials and recycling of occupant waste materials.<sup>11</sup>

Mitigation strategies are rapidly evolving, and will continue to as green building economics demonstrate what is possible. Ultimately, what is considered “best practices” will become more standardized.

## **2.2 Litigation**

There is no published Washington SEPA climate change case. However, there are several federal cases under the National Environmental Policy Act dating back to 1990. There has also been climate change litigation under California’s Environmental Quality Act, which is similar to SEPA. Perhaps the most significant case is the United States Supreme Court decision in *Massachusetts v. Environmental Protection Agency* finding the Clean Air Act provides EPA with authority to regulate greenhouse gases as pollutants.<sup>12</sup> Although not a National Environmental Policy Act case, last year’s 5-4 decision gave legal impetus to the need to address climate change.

Consistent with this decision, several earlier NEPA decisions have required large projects to assess their greenhouse gas impacts in an EIS. For example, one case involved constructing rail lines to reach coal mines in Wyoming’s Powder River Basin.<sup>13</sup> Another involved connecting the power grid to power plants in Mexico.<sup>14</sup>

California’s superior courts have dealt with a number of environmental review cases. The case most discussed by practitioners is *California v. San Bernardino County*.<sup>15</sup> There, the state challenged the County’s 30-year plan update, because the County had not assessed the greenhouse gas emissions associated with expected growth. The case settled when the County agreed to analyze greenhouse gas emissions and adopt feasible mitigation measures. Several other cases are pending in the California superior courts.

These cases illustrate the types of actions litigants have focused on to force decision makers to consider climate change. Washington jurisdictions have an opportunity to minimize this type of litigation, if a relatively standardized approach to SEPA mitigation can be developed.

### 2.3 Using SEPA to Promote Green Development

Jurisdictions planning under GMA have several tools available to streamline environmental review for projects meeting sustainable development criteria.

#### 2.3.1 Crafting a SEPA “Green Development Exemption” – RCW 43.21C.229

SEPA authorizes GMA jurisdictions to design exemptions to fit sustainable development objectives. Jurisdictions may exempt “[n]ew residential or mixed-use development proposed to fill in an urban growth area” if: (1) development intensities do not exceed comprehensive plan allowances; and (2) an environmental impact statement assessed plan impacts.<sup>16</sup>

To utilize this provision, the jurisdiction could complete an environmental impact statement on the targeted infill area and proposed “sustainability criteria,” then adopt implementing regulations consistent with RCW 43.21C.229. With the statutory caveat that the local exemptions are subject to Department of Ecology rules providing exceptions to categorical exemptions, this is potentially a useful and often over-looked strategy.

#### 2.3.2 Standardizing Sustainability Mitigation - RCW 43.21C.240

GMA jurisdictions may adopt “sustainability criteria” into their comprehensive plan and/or development regulations. They may then determine that if these criteria are complied with, greenhouse gas impacts have been adequately addressed pursuant to RCW 43.21C.240.

**A comprehensive plan, subarea plan, or development regulation shall be considered to adequately address an impact** if the county, city, or town, through the planning and environmental review process under chapter 36.70A RCW and this chapter, has **identified the specific adverse environmental impacts** and: ... (b) The legislative body of the county, city, or town has **designated as acceptable** certain levels of service, land use designations, **development standards**, or other land use planning required or allowed by chapter 36.70A RCW.<sup>17</sup>

By legislatively determining certain criteria adequately address greenhouse gas emissions, jurisdictions can standardize mitigation and encourage “green development.”

## 3. GROWTH MANAGEMENT ACT

The Washington Growth Management Act (“GMA”, Chapter 36.70A RCW) does not have specific climate change requirements. However, given the linkage between land use planning and climate change, several jurisdictions are addressing climate change and sustainable development issues in their plans and regulations.

### 3.1 GMA Provisions Related to Climate Change

Public outcry over congestion and the sprawling development patterns responsible for congestion prompted GMA's enactment. The outcry centered on commute times, but sprawl also impacts vehicles emissions:

The largest source of Washington's GHG emissions is transportation, accounting for nearly half of total State gross GHG emissions in 2005. The next largest contributors to total gross GHG emissions are fossil fuel combustion in the residential, commercial, and industrial (RCI) sectors at 20%, and in the electricity generation facilities that deliver power to these sectors, also 20%.<sup>18</sup>

Several GMA provisions are relevant to this issue. GMA's goals promote concentrated, urban development with adequate public facilities, efficient multi-modal transportation, and environmental protection.<sup>19</sup> GMA requires comprehensive plans to include land use and transportation elements to address these types of issues, and for county-wide planning policies to provide for regional coordination on solutions.<sup>20</sup> In addition, GMA's Chapter 47.80 RCW<sup>21</sup> promotes regional transportation system development.

Climate change can also be an issue for GMA protected critical areas and natural resources. For example, the Department of Community, Trade and Economic Development ("CTED") critical areas guidance notes "[c]ounties and cities should consider ... sea level rise resulting from global climate change ... when designating and classifying frequently flooded areas...."<sup>22</sup> Climbing temperatures decrease snow pack, raise sea levels, and alter precipitation patterns. This in turn can impact critical aquifer recharge areas; fish and wildlife habitat; agricultural lands; and forest resources.<sup>23</sup>

In addition to protecting natural resources and critical areas, and prompting tight-knit development patterns, GMA links planned growth with "sustainable economic development;"<sup>24</sup> calls for growth within the capacity of the state's natural resources;<sup>25</sup> has a goal addressing air quality;<sup>26</sup> and optional comprehensive plan elements include "conservation" and "solar energy."<sup>27</sup> Nevertheless, GMA does not target climate change head on. There is no GMA requirement for comprehensive plans to include a "climate change element," and there is no goal specific to climate change. This led to proposals to amend GMA during the last legislative session.<sup>28</sup> New substantive GMA requirements for local action were not passed, but CTED was tasked with an ambitious work program.

Through Engrossed Substitute House Bill 6580, CTED is directed to "develop and provide to counties and cities a range of advisory climate response methodologies, a computer modeling program, and estimates of greenhouse gas emission reductions resulting from specific measures."<sup>29</sup> The work is to be completed by December 1, 2009.

CTED is also to convene an advisory policy committee to assist in preparing a comprehensive report. The report is to address actions jurisdictions are taking to address climate change; recommended changes to GMA; descriptions of existing and potential computer modeling tools; impacts to affordable housing, transportation costs and economic developments;

and assessments of state and local resources needed to implement certain recommendations. This report is due December 1, 2008.<sup>30</sup>

### **3.2 Example Comprehensive Plan Provisions**

Jurisdictions are starting to draft policies related to climate change in their comprehensive plans. For example, Seattle amended existing policies and added new language this past December. A few provisions are as follows:

- Conduct an inventory of greenhouse gas emissions in Seattle at least every three years. Use data, public input, and approaches developed by other public agencies and private organizations that address sustainability.
- [R]educe emissions of carbon dioxide and other climate-changing greenhouse gases in Seattle by 30% from year 1990 levels by 2024, and by 80% from 1990 levels by 2050.
- Work with private and public sector partners in ... reducing climate-changing greenhouse gas emissions from private and public sources to control the impacts of global warming on the city's water supply, electrical energy supply, ecosystems, public health, and economy. Work to establish a standard for greenhouse gas emissions for privately owned buildings.
- Reduce consumption of fossil-fuels in all new City government buildings in the following increments (percent reduction from 2007 U.S. average for each building type): 60% in 2010; 70% in 2015; 80% in 2020; 90% in 2025; and Carbon Neutral by 2030 (meaning new buildings will use no fossil fuel, green house gas emitting energy to operate).<sup>31</sup>

King County has also proposed numerous plan amendments relating to climate change. A few examples are cited above, in Section 2.1.3. The City of Olympia includes provisions on sustainable practices throughout its plan, including policies encouraging green building practices.<sup>32</sup> Additional resources are available on the Municipal Research and Services Center of Washington website, [www.mrsc.org](http://www.mrsc.org).

## **4. SHORELINE MANAGEMENT ACT**

Like GMA, the Shoreline Management Act ("SMA", Chapter 90.58 RCW) does not directly address climate change, but contains relevant provisions. The SMA is designed, in part, to protect shorelines from "adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto."<sup>33</sup> Shoreline regulations require jurisdictions, and Ecology, when approving shoreline master programs, to assess eco-system functions, and take actions to preserve natural resources for the next generation:

Optimum implementation places a greater imperative on identifying, understanding, and managing ecosystem-wide processes and ecological functions that sustain resources of statewide importance. ... Prepare master program provisions on the basis of preserving the shorelines for future generations.<sup>34</sup>

As with GMA, climate change considerations can be expected to start playing a more significant role in designing adaptation and mitigation measures.

## **5. WASHINGTON STATE CLIMATE CHANGE/LAND USE POLICY**

Creating a state-wide sustainable development industry requires harnessing economic self interest. Washington's Legislature recognized this, when it tied green house gas reduction to economic objectives in last year's enactment of SB 6001, which set greenhouse gas reduction and "clean-tech" job creation targets.<sup>35</sup> The legislation required the Governor to provide recommendations for addressing its goals.<sup>36</sup> Washington State's Climate Advisory Team was formed to develop these recommendations.

The Advisory Team issued draft recommendations for reducing, sequestering, and removing GHG emissions in 2007, and followed up with an Interim Report in February, 2008. Green building and sustainable design incentives are a key part of these recommendations. "Efficient community planning holds perhaps the greatest potential for future reductions of any strategy."<sup>37</sup> Advisory Team work is continuing this year, with numerous approaches relating to land use planning being considered, including:

- Provide tax incentives for energy-efficient buildings and building systems.
- Provide incentives for improved community planning and improved building design and construction in the private and non-state public sectors.
- Tie state economic development funding to meeting building and community design standards.
- Promote compact and transit oriented development.<sup>38</sup>

Strategies the legislature later adopts will influence green building practices, and how quickly practices evolve. The most effective policy framework would reward projects meeting sustainability criteria with more certainty on project approvals, less appeal risk, and financial incentives.<sup>39</sup>

## **6. INCENTIVE STRATEGIES – A NOTE**

Municipal land use ordinances will play a key role in shaping land use practices to address climate change. Incentives play an important part in achieving both municipal and developer goals. Current land use statutes offer a variety of tools for achieving sustainability goals. A few are addressed below.

### **6.1 Development Criteria – The Vision**

Incentives are always tied to achieving specific goals. Defining these goals, or the "vision," can be the most challenging part of drafting an ordinance targeted at achieving sustainability objectives. The definitions for "green building" and "sustainable communities" are evolving. Examples include the US Green Building Council's LEED (Leadership in Energy and Environmental Design) certification processes; the Master Builder's Built Green program; Green Globes; and various programs which are under development, such as the Cascadia Region Green

