

## Executive Summary: Growth controls allowed under the GMA

By Daniel M. Warner

It is incorrect to assert that the Growth Management Act requires Whatcom County--or any county--to “accommodate” an infinite population increase. It is incorrect that “the Growth Management Act makes us do it”—forces us to watch this place become like King County or the greater San Francisco area.

(1) The law does not force counties to spend money on infrastructure improvement necessary to accommodate population growth. What the law says is that you can address inadequate infrastructure by *reducing demand on the facilities*. That is, stop issuing building permits.

(2) The law does not mandate that counties accept, without question, the state’s population projection figures. Counties can challenge the figures. If our county did things to retard population growth, we could go to the state and have them give us lower population projections.

The Growth Management Act is not forcing us to accept this enormous and ultimately ruinous population growth. This growth is a policy, indirectly adopted by our political leaders and by the citizens of our county when we all think that “smart growth” (what the GMA mandates) is the best we can do. It is not the best we can do. To start doing better, we need to know—at least—that we could do differently, if we had the political will.

Retarding or stopping the rate of growth presents many serious problems: political, economic, social, environmental and cultural. But these are *exactly the same problems* presented by the current infinite accommodation of growth. The difference is, with the latter program this place is changed into something we don’t want it to become; with the former program, we have something decent to pass on to our grandchildren.

It does not seem “selfish” to think that we should restrain ourselves for our grandchildren’s sake.

At least this: let’s stop saying the Growth Management Act makes us do it.

# Memo

To: Interested Persons

Fr: Dan Warner

Re: Growth controls allowed under the GMA: the GMA doesn't make us do it.

Da: April 12, 2005

There are at least two ways that a community could use the Washington State Growth Management Act to retard, or even stop, the growth that will apparently turn every attractive small Washington city and still semi-rural county into something like King County (or the greater San Francisco area, which now has a population of 6.7 million): (1) using of level of service standards, and (2) adjusting the population-projection figures used to determine how much population a county must "accommodate."

**1. Level-of-service standards could be used to retard growth.** This is contemplated in GMA regulations promulgated by the Department of Community Development. WAC 365-195-835 suggests that counties "identify the responses to be taken when it is determined that capacity [roads, sewer, jail, schools, etc.] is not adequate to accommodate a proposal."<sup>1</sup> Among the responses is "denial of the development, subject to resubmission when adequate public facilities are made available."<sup>2</sup> The regulations foresee moratoria: "With respect to facilities other than transportation facilities and water systems, local jurisdictions may fashion their own regulatory responses and are not limited to imposing moratoria on development during periods when concurrency is not maintained."<sup>3</sup> Jurisdictions are "not limited to imposing moratoria," but moratoria are one response. Another response is not approving the permit for development:

In fact, if probable funding falls short of meeting existing needs, the GMA requires that the community reassess its land use element. A community must be able to support proposed land uses with facilities and services which meet the standards a community has set. The community may need to downzone some areas or otherwise adjust land use plans. An appealing alternative may be to *reduce the demand on the facilities*.<sup>4</sup>

One way to "reduce demand on facilities" is simply not to approve building permits: "No, we are not going to approve this housing development, because it would increase traffic on this roadway beyond the road's capacity, and we are not going to spend millions of dollars to improve the road." A clean example is now a missed opportunity: "No, we

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<sup>1</sup> WAC 365-195-835(1) (2003).

<sup>2</sup> WAC 365-195(3)(d)(iii) (2203).

<sup>3</sup> WAC 365-195-070 (2003).

<sup>4</sup> MUNICIPAL RESEARCH SERVICE CENTER OF WASHINGTON, *Level of Service Standards: Measures for Maintaining the Quality of Community Life*, 13-14 (1994). This manual is cited in *Montlake Community Club v. Central Puget Sound Growth Management Hearings Board*, 43 P3d 57, at 59 (2002) as a standard reference. Emphasis added.

aren't going to buy a new ferry boat for Lummi Island. Because the present boat is at its level of service capacity, we won't issue any more building permits on Lummi Island."

If a county wants to develop LOS standards that retard or discourage growth, that would keep it from becoming like L.A., it should be free to do that. In 1998 the Washington State Court of Appeals opined on the matter of local choice, citing the 1990 Washington State Growth Strategies Commission which, the court noted "believes the foundation blocks of a statewide growth strategy are local governments. Locally elected officials working with their citizenry are best able to tailor broad growth policies to their communities."<sup>5</sup> In 1997, the Legislature reiterated its intention that, within the general GMA framework, local governments have broad discretion to develop specific comprehensive plans tailored to local circumstances.<sup>6</sup>

Using the Level of Service concept is one way to address ruinous growth.

**2. Lowering the population projection numbers.** A second approach to growth control envisions "manipulating" the population projection numbers.

a. The basic idea of population projections.

The GMA provides that the state Office of Financial Management (OFM)<sup>7</sup> calculate projected population increase for each county and requires that the county "accommodate" that projected growth. But the statute provides two opportunities to check on the calculation: a jurisdiction may petition the Office of Financial Management<sup>8</sup> to revise its projections, or it may petition the Growth Management Hearings Board for an adjustment of the population projections.<sup>9</sup>

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<sup>5</sup> <sup>1</sup>. Manke Lumber Co. v Diehl, 959 P2d 1173, 1178 (1998), quoting the Final Report of the Washington State Growth Strategies Commission, A Growth Strategy for Washington State, at 4 (September 1990).

<sup>6</sup> <sup>1</sup>. RCW 36.70A.320: "In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. *Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances.* The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community" (emphasis added).

<sup>7</sup> <sup>1</sup>. Any legitimate, credible population projection can be used. In 2004 Whatcom County adopted numbers generated by a private consultant, ECONorthwest. See Sylvia Goodwin, "Memorandum" to County Planning Commission, April 24, 2003, p. 1.

<sup>8</sup> <sup>1</sup>. RCW 43.62.035: ". . . If any city or county believes that a projection will not accurately reflect actual population growth in a county, it may petition the office [of financial management] to revise the projection accordingly. . . ."

<sup>9</sup> <sup>1</sup>. Growth Management Hearings Boards were created via amendment to the GMA in 1991 (Laws of 1991, 1st Sp. Sess., ch. 32, § 5, codified at RCW 36.70A.250. Their power is to review petitions complaining of non-compliance with the GMA or to review petitions claiming that OFM's population projections should be adjusted. RCW 36.70A.280(1)(b): ". . . A growth management hearings board shall hear

b. The test used to determine if the state's projections are correct. In a 1995 decision, the Central Puget Sound Growth Management Hearings Board took up the question of whether the OFM's population projection for Kitsap County should be adjusted, as the County had petitioned (it wanted higher numbers--more projected population). The Central Board decided that the projections could be adjusted if (1) the County could show by a preponderance of evidence that its proposed adjusted population projection was supported by "more objective data, credible assumptions and analytical methods" than OFM's projection and (2) that the proposed adjustment would not thwart the goals or other requirements of the act.<sup>10</sup>

1) the first prong of the test: the burden of proof. In 1997 the legislature, perhaps addressing this decision, changed the standard of review. RCW 36.70A.320(3) formerly provided that the burden is on a petitioner to demonstrate that any action by a state agency, county, or city is not in compliance with the requirements of the law, and that, "The board shall find compliance unless it finds by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied this chapter." The 1997 amendments provide, "The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the act."<sup>11</sup>

This seems to raise the bar for counties that might complain about the population projections; they would have to show that the state agency's (the OFM's) projections are "clearly erroneous." But in the next section of the RCW the legislature explicated that in amending this section, it "intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. . . [T]he legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistence with the requirements and goals of this chapter" because the legislature recognizes that "the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community."<sup>12</sup>

The situation is a bit ambiguous. If a county protests that OFM's population projections are incorrect it should first attempt to get OFM to "revise"<sup>13</sup> its projection. As-

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and determine. . . petitions alleging. . . 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."

<sup>10</sup> 1. Kitsap County v. Office of Financial Management, 1995 WL 903132 \*9 (Wash. Central Puget Sd. Growth Mgmt. Hrgs. Bd). "The Board's jurisdiction is limited to the four-county Central Puget Sound region by RCW 36.70A.250. Thus, the precedential impact of this Board's decision is limited to King Pierce, Snohomish and Kitsap Counties." *Id.* at \*5. The other two boards are the Western Board and the Eastern Board.

<sup>11</sup> 1. RCW 36.70A.320(3).

<sup>12</sup> 1. RCW 36.70A.3201 (1997).

<sup>13</sup> 1. Note 110, *supra*.

sume a county presents information, in accordance with RCW 43.62.035, to OFM for its use in developing population projections: the statute says that OFM should review its "projections with [the] county and the cities in those counties before final adoption. The county and its cities may provide to the office such information as they deem relevant to the office's projection, and the office shall consider and comment on such information before adoption."<sup>14</sup> By statute OFM is not required to give particular "deference" to the county's relevant information and documentation. But if it does not, and uses its own information instead, and comes out with a result different from the county's, the import of RCW 36.70A.3201 is frustrated: the county is unable to "balance priorities and options for action in full consideration of local circumstances." Is the county's compilation and presentation of "information" to OFM an "action" under 70A.320, to which the hearings boards give "deference"?

If OFM will not revise its projections, then the county must petition the hearings board for an "adjustment" of the population projections. The county must convince the hearing board that OFM is "clearly wrong"; but such a high bar is arguably contrary to the "deference" to be given to counties and cities in how they plan for growth.

In any event, the point here would be for the county to develop a "county overall economic development plan" that encourages prosperity but discourages population growth. This "plan" is specifically called for if "rural" counties wish to retain a portion of the sales tax "to finance public facilities serving economic development purposes in rural counties. The public facility must be listed as an item in the officially adopted county overall economic development plan."<sup>15</sup> It is beyond the scope of this memo to detail how a county might go about promoting prosperity without growth; others have examined the issue.<sup>16</sup> In addition to the plan, a county might list other actions taken to discourage population growth, such as withholding funding from the Chamber of Commerce or the Visitors and Convention Bureau if they include information on "relocation assistance" on their web sites or if they use public money to recruit out-of-area businesses. A county might also reform certain aspects of land use to discourage population build-out in rural areas (by "down zoning," for example); it might note that it is *not* applying for loans and grants (from state and federal programs) for infrastructure "improvements" that attract out-of-area businesses, that is it not seeking traditional "growth" policies. The plan and the list could be part of an overall package used to argue to both OFM and the hearings board that the county is actively seeking ways to discourage population increase, and that, therefore, the OFM projections are wrong.

2) The second prong of the test: support the goals of the act. Again, the first prong of the test to determine whether a county's population projection figures are more acceptable than what the state has accepted involves issues of the burden

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<sup>14</sup> 1. RCW 43.62.035

<sup>15</sup> 1. RCW 82.14.370

<sup>16</sup> 1. MICHAEL J. KINGSLEY, ECONOMIC RENEWAL GUIDE: A COLLABORATIVE PROCESS FOR SUSTAINABLE COMMUNITY DEVELOPMENT (1997) presents a number of suggestions. See other references in this paper's Conclusion, *infra*.

of proof. The second prong is *that the proposed population adjustment would not thwart the goals or other requirements of the act.*

Satisfying this prong presents problems, as does satisfying the first one. There is some sense, on the one hand, that every jurisdiction should bear its fair share of the burden of population growth. Fancifully, it would be unfair if every county along the I-5 corridor except, say, Snohomish, refused to accept new population. In dicta, the Washington State Supreme Court has brought up the idea that a city (not a county, however) should “accommodate its GMA-mandated share of growth,”<sup>17</sup> and the court has recognized that such burdens must be assumed because it is “[g]iven that our population must live somewhere. . .”<sup>18</sup> On the other hand, among the GMA “planning goals” is included the recognition that economic and concomitant population growth must take place “all within the capacities of the state’s natural resources, public services, and public facilities.”<sup>19</sup> It would seem that if these are strained by growth, then growth restraints are--or could be--part of the goals of the act. There is no doubt that the state’s natural resources, its government-provided human services, and its infrastructure are very severely strained by population growth and consumption habits. Our present course is not sustainable.<sup>20</sup>

The population projection figures are reviewed every year by the state<sup>21</sup>, and apparently can be challenged at any time. The statute does not restrict the right to contest the population figures to the periodic times when the state develops its projections for use in the GMA-required “accommodation” calculation.

3. Amending the GMA. The third mechanism for retarding or stopping the ruinous growth would be to amend the GMA. RCW 36.70A.110 presently requires that “the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding

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<sup>17</sup> City of Redmond vs Central Puget Sound Growth Management Hearings Board, 959 P2d 1091, 1092 (1998).

<sup>18</sup> *Id.* at 1101.

<sup>19</sup> RCW 36.70A.020(5)

<sup>20</sup> In October 2002, Governor Gary Locke of Washington State established a “Governor’s Sustainable Washington Advisory Panel” to examine the state of the State’s environment and to suggest things that its citizens might be do to improve it and move the state toward sustainability. In February 2003 the Panel reported to the governor. The state of the environment was “sobering indeed.” “Today’s reality”--as one section of the report is titled-- is that our “health is at risk,” “social inequities [are] on the rise,” there is “decline and disruption in our Natural Systems,” there is “Loss of Economic Vitality, Opportunities Unrealized,” and there is “Threatened Biodiversity, Habitat, Icons.”

<sup>21</sup> RCW 43.62.035: “The office of financial management shall determine the population of each county of the state annually as of April 1st of each year and on or before July 1st of each year shall file a certificate with the secretary of state showing its determination of the population for each county. The office of financial management also shall determine the percentage increase in population for each county over the preceding ten-year period, as of April 1st, and shall file a certificate with the secretary of state by July 1st showing its determination.”

twenty-year period.” The word “shall” should be replaced by the word “may.” In the same context RCW 36.70A.130 should be amended; it now requires that the comprehensive plan “shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period.” Again, the word “shall” should be replaced by “may.” In general, the GMA should be modified to allow, rather than require, enlarging the UGA to maintain a 20-year land supply.

## **Conclusion**

Perhaps it is amazing to argue, seriously argue, that growth as we know it should stop. But everybody recognizes that growth will have to stop, eventually: a county could grow to half a million population, or 50 million or it could become a huge megapolis, perhaps, of a billion. But it could not grow to a population of 50 billion. Infinite growth is impossible. At some point, growth will have to stop; it is undisputable. Most people apparently want to pass the responsibility for facing that truth off to the future. It is difficult to imagine that communities will find the necessary political determination in the future that they cannot find today, but still, most people seem to say, “After I’m dead, they’ll figure out how to stop growth.” If we as a society are going to do what is obviously necessary--develop a steady-state economy before it is really very late--we need not only to recognize the tools legally available, such as they are, but we need also to develop some coherent response to the typical objections.

The objections—that growth controls are un-American, unconstitutional, infeasible—can all be addressed. That is beyond the scope of this memo.<sup>22</sup> What is required is the political will. Generating that political will starts with disabusing the public of the notion that “there is nothing we can do.” If we have a democracy here, and if people do not want their home-place to become like L.A., then there *is* something we can do, with the tools we now have available. It is hoped that our elected and appointed officials will begin to point that out.

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<sup>22</sup> . The author has this analysis for any reader who wishes it.