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NOT CONFIDENTIAL

Date: July 8, 2010
To: County Commissioners
County Administrator
DCD Director Al Scalf
Title 18 Administrator/SEPA Official Stacie Hoskins
Michelle McConnell
From: David Alvarez, Chief Civil DPA
Topic: Locally Approved Shoreline Master Program (LA-SMP)

Issue:

A citizen, attorney Jim Tracy, has raised the question of whether there was a procedural defect in the BoCC's adoption of the LA-SMP in December 2009 because the LA-SMP has not been the subject of a U.S. Constitution "Fifth Amendment-No takings without just compensation" analysis prior to local adoption occurring.

Is such a failure to undertake a Fifth Amendment "takings" analysis a procedural defect in the local approval of the LA-SMP?

Short Answer: No.

Background:

Because Jefferson County is a county planning under the Growth Management Act (or "GMA" as codified at Ch. 36.70A RCW), any person or entity wishing to assert the unlawfulness of the LA-SMP must appeal to the Western WA Growth Management Hearings Board or "WWGMHB." In this regard see RCW 90.58.190(2)(a) (from the Shoreline Management Act or "SMA") and RCW 36.70A.290(2)(c), found within the GMA.

Note well, of course, that there is nothing to appeal until the WA State Dept. of Ecology ("Ecology") approves or disapproves of the LA-SMP. At that point the County must publish a notice that the SMP has been approved or disapproved, said publication serving to begin a 60-day time frame within which an aggrieved person or entity can appeal. See RCW 36.70A.290(2) for the 60-day time frame and RCW 36.70A.290(2)(c) for the requirement that the decision of Ecology be published.

Note also that the WWGMHB has been granted statutory authority to determine if an ordinance adopted by a local government such as Jefferson County complies with the SMA. See the first paragraph of RCW 36.70A.290(2).

Relevant state law:

The citizen's inquiry is based on RCW 36.70A.370, which reads as follows:

"36.70A.370. Protection of private property

(1) The state attorney general shall establish by October 1, 1991, an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. It is not the purpose of this section to expand or reduce the scope of private property protections provided in the state and federal Constitutions. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in case law.

(2) Local governments that are required or choose to plan under RCW 36.70A.040 and state agencies shall utilize the process established by subsection (1) of this section to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property.

(3) The attorney general, in consultation with the Washington state bar association, shall develop a continuing education course to implement this section.

(4) The process used by government agencies shall be protected by attorney client privilege. Nothing in this section grants a private party the right to seek judicial relief requiring compliance with the provisions of this section."

Attorney Tracy also brought to the attention of the BoCC a decision from the WWGMHB known as *Laurel Park Community LLC v. City of Tumwater*, WWGMHB #09-2-0010 (FDO 10/13/2009).¹ That decision struck down a Tumwater ordinance creating a "single use manufactured home park zone" for failure to comply with Goal 6 (property rights), more specifically the absence of any evidence indicating that Tumwater used the "Attorney General review process" mandated in the GMA by RCW 36.70A.370(2).

Of importance to note is that the decision in *Laurel Park Community LLC* arose in the context

¹ The current status of the *Laurel Park Community LLC* case is that there is a pending APA appeal before the Thurston County Superior Court brought by the Petitioners. Thurston County Superior Court refused to issue a Certificate of Appealability which, if granted, would have circumvented the Superior Court and set the matter immediately before the Court of Appeals, Division Two. Source of this information is the WWGMHB web site.

of a challenge to a development regulation and amendments to the city's Comprehensive Plan proposed and adopted pursuant to the GMA and that decision did not involve a Shoreline Master Program or the SMA. Neither the SMA nor a Shoreline Master Program is mentioned once in the FDO from October 2009.

The absence of any SMA or SMP references in the *Laurel Park Community LLC* case is of great significance because the WWGMHB, although it has authority to hear challenges to the County's SMP, must use the SMA rather than the GMA when determining the lawfulness of the County's SMP. Here is the text in the GMA that leads me to that conclusion, codified in RCW 36.70A.480, particularly RCW 36.70A.480(2) and RCW 36.70A.480(3)(a).

"36.70A.480. Shorelines of the state

- (1)
- (2) The shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW rather than the goals, policies, and procedures set forth in this chapter for the adoption of a comprehensive plan or development regulations.
- (3)(a) The policies, goals, and provisions of chapter 90.58 RCW and applicable guidelines shall be the sole basis for determining compliance of a shoreline master program with this chapter except as the shoreline master program is required to comply with the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105.
- (b)
- (c)
- (d)
- (e) The provisions of RCW 36.70A.172 shall not apply to the adoption or subsequent amendment of a local government's shoreline master program and shall not be used to determine compliance of a local government's shoreline master program with chapter 90.58 RCW and applicable guidelines."

The reader can note that only quite limited sections of the GMA are relevant to the analysis a regional Hearings Board must undertake when it is asked to rule on a challenge to a SMP and that RCW 36.70A.370 is NOT among those listed in the RCW found above.

Additionally, there is a parallel provision in the SMA to reaffirm that the SMP has to be considered and compared against the SMA statutes and related regulations rather than the GMA statutes and regulations even if a GMA regional Hearings Board is the administrative law agency ruling on the validity of the SMP. The reader is referred to RCW 90.58.190(2)(b):

"90.58.190. Appeal of department's decision to adopt or amend a master program

- (1)

(2)(a) The department's final decision to approve or reject a proposed master program or master program amendment by a local government planning under RCW 36.70A.040 shall be appealed to the growth management hearings board by filing a petition within sixty days from the date of the department's written notice to the local government of the department's final decision to approve or reject a proposed master program or master program amendment, as provided in RCW 36.70A.290. The department's written notice must conspicuously and plainly state that it is the department's final decision and that there will be no further modifications under RCW 90.58.090(2).

(b) If the appeal to the growth management hearings board concerns shorelines, the growth management hearings board shall review the proposed master program or amendment solely for compliance with the requirements of this chapter, the policy of RCW 90.58.020 and the applicable guidelines, the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58 RCW."

Of significance in the above-listed RCW is the absence of any reference to RCW 36.70A.370.

Because the WWGMHB must examine the SMP in the light of the SMA rather than the GMA (with certain exceptions listed below) I conclude that a regional Hearings Board such as the WWGMHB cannot utilize or rely upon RCW 36.70A.370 when reviewing any SMP for compliance with the SMA.

Also note that the WWGMHB at page 10 of the FDO it issued in *Laurel Park Community LLC v. City of Tumwater*, WWGMHB #09-2-0010 (FDO 10/13/2009) reminded its audience "we do not have the authority to determine if an unconstitutional 'taking' of the Petitioners' property occurred." In sum, none of the regional Hearings Board can reach or decide the substantive question of whether a GMA-derived Ordinance violates the Fifth Amendment of the U.S. Constitution because it amounts to an uncompensated "taking."

Conclusion:

Both the GMA and SMA include express statutory sections to make it clear that when a Hearings Board such as the WWGMHB is asked to review a SMP that review must be done pursuant to the rules and regulations that surround the SMA rather than the parallel statutes and regulations applicable in the GMA "universe."

Please do not hesitate to contact me with any questions or concerns.

UNSIGNED BECAUSE DELIVERED TO THE RECIPIENTS VIA E-MAIL

David Alvarez, Chief Civil DPA