



# CAO Fact Sheet #4

7/23/11

## **4. The San Juan County Council Must Create a Record Showing That They Balanced All of the Planning Goals with Consideration Given to Local Circumstances**

### **The Law**

Washington state law spells out “planning goals” for the development of local comprehensive plans and development regulations. For all counties and cities that are required to plan under the Growth Management Act (GMA), as described in RCW 36.70A.040, the planning goals set forth in 36.70A.020 are the guide. Additionally, when considering critical areas development regulations pursuant to 36.70A.060 and when planning under the GMA, the goals apply.

### **Balancing the Planning Goals**

The GMA requires that local government balance all 14 planning goals when updating its critical areas regulations. While this process is difficult, and some of the goals are in tension, seeking balance assures that consideration is given to all of these important matters while respecting local conditions; and it is a statutory requirement.

The GMA goals are summarized as follows:

1. Urban growth: encourage development in urban areas.
2. Reduce sprawl: reduce inappropriate low-density development.
3. Transportation: encourage efficient, coordinated regional transportation systems.
4. Housing: encourage the availability of affordable housing for all economic segments of the population.
5. Economic development: promote economic opportunity.
6. Property rights: prohibits taking of property for public use without compensation and protection from arbitrary or discriminatory acts.
7. Permits: encourage timely, fair and predictable government permits.
8. Natural resource industries: Maintenance and enhancement of natural resource-based industries and conservation of productive lands.
9. Open space and recreation: retain open space, enhance recreational opportunities.
10. Environment: protect the environment and enhance quality of life.
11. Citizen participation and coordination: encourage citizen

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Citizens' Alliance for Property Rights was organized in 2003 as a non-partisan political action committee where individual citizens and existing organizations can work together defending property rights.

We will support equitable and scientifically sound land use regulations that do not force minority groups of private property owners to pay for public benefits enjoyed by all.

Please visit our web sites:

<http://www.capr-sanjuan.org/> ,  
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involvement in planning.

12. Public facilities and services: ensure that facilities and services are adequate to support development.

13. Historic preservation: encourage the preservation of significant land, sites or structures.

14. Shoreline: incorporates the goals and policies of the Shoreline Management Act. (RCW 36.70A.020; RCW 36.70A.480)

### **There is No Priority Amongst the Planning Goals**

Regulators must seek balance between the goals. For example, the GMA goal of environmental protection versus protection of property rights requires legislators to consider both goals equally and without prejudice. Some environmentalists and regulatory agencies share the belief that the goal of protecting the environment is accompanied by a requirement and therefore takes priority over all other GMA planning goals. The law does not support this idea.

The GMA explicitly states that the planning 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:*”<sup>1</sup> And the Supreme Court has confirmed this: “The [GMA’s planning] goals are not listed in order of priority . . .” (RCW 36.70A.020. *Swinomish Indian Tribal Community v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424-25 (2007); *Viking Properties Inc. v. Holm*, 155 Wash. 2d 112 (2005)) (“We decline [the] invitation to create an inflexible hierarchy of the GMA goals where such a hierarchy was explicitly rejected by the legislature.”).

Therefore, contrary to the proclamations of many loud voices in the land use debate, the GMA explicitly eschews establishing priorities amongst the goals.

**The San Juan County Council must create a record showing that they deliberated on all of the planning goals and made determinations as to the weight to be afforded each, and the reasons therefore, with due consideration being given to local circumstances.**

The state legislature, in adopting the provisions of the GMA, did not set out to impose statewide growth planning. The GMA is specifically designed to allow discretion at the local level, tempered by local circumstances. Note the use of the term “goal”. A goal is a purpose toward which endeavor is directed. A goal is not a mandate, it is an aspiration. In order to satisfy the responsibilities that the GMA leaves to San Juan County, all of the planning goals of the GMA must be considered by the Planning Commission and the County Council in crafting comprehensive plan

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<sup>1</sup> RCW 36.70A.020

provisions and development regulations. The failure to do so is to exalt one goal or group of goals over the others in defiance of the explicit language of the GMA.

“At the GMA’s core is the requirement that local government develop their land use regulations by balancing a variety planning goals. For example, the GMA requires that local government protect “critical areas” while at the same time “[m]aintain[ing] and enhanc[ing] natural resource-based industries, including productive timber, agricultural, and fishing industries” as well as “[e]ncourag[ing] the conservation of agricultural lands, and discourag[ing] incompatible uses.” See RCW 36.70A.060(2), (8).

“Balancing the GMA’s goals in accordance with local circumstances is precisely the type of decision that the legislature has entrusted to the discretion of local decision-making bodies. RCW 36.70A.3201”<sup>2</sup>

“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.”<sup>3</sup>

The challenge to local counties and cities is, therefore, to craft comprehensive plans and development regulations that:

- Provide for the fair use and development of private property.
- Encourage and reward voluntary enhancement and restoration efforts.
- Provide predictability in the permitting process.
- *Do not* designate existing uses as non-conforming.
- *Do not* drive up the cost of housing.
- *Do not* unnecessarily hinder economic opportunity.
- Protect the environment we all enjoy.

A local example of a way to protect critical areas without trampling on the rights of landowners is the number of voluntary programs that keep 47% of Island parcels free of development; protecting the environment while recognizing property rights. It is not whether we protect the people’s rights, the economy and the environment; it is how we do it. The GMA provides the flexibility needed for local

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<sup>2</sup>

<http://www.mrsc.org/mc/rcw/RCW%20%2036%20%20TITLE/RCW%20%2036%20.%2070A%20CHAPTER/RCW%20%2036%20.%2070A.3201.htm>

<sup>3</sup> (RCW36.70A.3201)

government to come up with local solutions.

### **Conflicting “Advice” from State Regulatory Agencies**

Our local process is being undermined by the Department of Ecology and Department of Commerce. Although their role in our process is “advisory”, they seem bent on giving advice to our Council that will lead toward litigation. In 2006 these departments appealed the Ordinance of the City of Kent to the GMA hearings board insisting that balancing the goals of GMA was secondary to designating and protecting critical areas. The agencies now rely on that GMA Hearings Board decision and believe that it creates “precedent” on this issue, as is revealed in these quotes:

*“GMA goals in Section 020 are not in priority order. But for some goals the act also includes specific requirements. That's what gives them more weight. The environment goal is one of those that is accompanied by several requirements, where the law says shall.”* (Email from Tim Gates Commerce GMA Services, July 2009)

*“The first document is Chapter 2 of Volume 2 of Ecology's BAS document titled "Wetlands in Washington State" which I believe is in the record. I think it will answer the questions you asked regarding the duty to designate and protect critical areas before balancing the thirteen goals of the GMA.”* (Email from Eric Stockdale DOE to Lovel Pratt, May 17, 2011)

To the contrary, Julie Nichols, BIAW Legal Counsel, speaks directly to the above statement by Gates, *“This statement has no foundation in statute or case law and should not be used to guide local decision making.”*<sup>4</sup>

Additionally, Brian Hodges, Pacific Legal Foundation, said in response to Stockdale’s statement regarding the value of the Kent decision as legal precedent: *“Ecology/Commerce's response is incorrect . . . The Growth Board decision in the City of Kent case cannot be relied on as "precedent." The Board's decision was accepted for review by the Supreme Court but the case was rendered moot because Kent adopted a new CAO while the case was pending.”* (July 2011)

The intrusion of state agencies into the local process to the point where they not only advise County Staff on their version of the law but also tell hired experts what their written “opinion” should or should not be, speaks to the desire of these agencies to fit San Juan County with a one size fits all “solution” to it's critical areas ordinance. This desire on the part of Ecology and Commerce flies directly in the face of the bottom-up, locally driven process that state law through the GMA provides. San Juan County has an unfortunate, expensive history of adopting legislation that

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<sup>4</sup> BIAW letter to the Attorney General, July 2009

was designed for urban areas and that does not fit its unique geography, economy or population. The “advice” of off-island regulators is often to blame.

## **Balancing Competing Goals**

### **1. GMA Goal #5: Encourage Economic Development**

As we examine the competing goals, the challenge of balancing the regulations comes into focus. Protecting the economy must be balanced with environmental preservation.

*“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, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities” (RCW 36.70A.020 (5))*

The proposed regulations must balance the goal of encouraging economic development with preservation of the environment *specifically* “in areas experiencing insufficient economic growth.” This describes San Juan County perfectly.

Presently our economic growth is non-existent and declining for several reasons. San Juan County’s primary “regional differences” are the fact of our shoreline dependency, our limited transportation alternatives, and lack of industries that create living wage jobs. If the purpose of CAO regulations is to impose policies that discourage economic opportunities and limit residential or commercial development in favor of environmental concerns then this goal will not be met.

The Council must also adhere to our local policies. This is the first and primary policy concerning our economy and its relationship with land use: “Provide a predictable development atmosphere for the local economy through the formulation of clearly defined land use designations, regulations and standards.” (SJCCP 2.2.B *Economy*) Compliance with this policy requires a balanced approach to regulation.

If the CAO regulations are not balanced there will be a negative impact on the construction industry, real estate, and related retail businesses leading toward the collapse of our struggling local economy. Our economy depends on these industries for survival.<sup>5</sup>

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<sup>5</sup> Retail Sales by Industry 2008 3-year average Construction & RE produced 40.47% of sales in SJC.

Preservation policies that limit access to almost half of county land combined with proposed imposition of large buffer zones through the CAO will further restrict the ability for property owners to develop private land and will be devastating to the economy. If you want to see what restrictive policies do to this segment of our local economy, look around you now. Is this the kind of economy we want?

Policies that protect the environment at the expense of limiting residential development may have unintended consequences. While they may protect critical areas, at the same time they limit access to development, restrict economic opportunity, limit social diversity, and drive up the cost of development while shifting the tax burden to rural landowners and small businesses. If we continue in this direction, the future promises small communities of workers in subsidized housing serving the remaining few well-to-do members of the yacht-club class. This is not a vision anyone wants to see.

## **2. GMA Goal 6: Protection of Property Rights – A Constitutional Requirement**

The property rights planning goal has two distinct components:

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. RCW 36.70A.020(6)

The first component is the constitutional prohibition against taking private property without due process and just compensation.<sup>6</sup> The second component is the protection of property rights against arbitrary and discriminatory actions even where there is no constitutional taking (*See Id.*).

To assure that property rights are appropriately considered in developing GMA regulations, the Growth Management Act directed the Office of the Attorney General to develop a process which local government is required to utilize in order

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More than half of the total economic activity in WA is a direct result of residential building activity. Source: *Economic Benefits of Housing in Washington*, 2009

<sup>6</sup> See Attorney General Opinion No. 23 (1992); see also RCW 36.70A.370; WAC 365-195-855. CAO regulations must also comply with the constitutional nexus and proportionality tests incorporated into RCW 82.02.020. See *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 761, 763 (2002) (The nexus test “does not permit conditions that satisfy a ‘reasonably necessary’ standard for all new development collectively; it specifically requires that a condition be ‘reasonably necessary as a direct result of the proposed development or plat.”); *Citizens’ Alliance for Prop. Rights v. Sims*, 145 Wn. App. 649, 668-69 (2008), *rev. denied*, 165 Wn.2d 1030 (2009) (A preset condition requiring landowners to set aside 50-65 percent of their land as a natural vegetation area failed to satisfy proportionality.).

to evaluate its proposed regulations “to assure that such actions do not result in an unconstitutional taking of private property.”

(1) The state attorney general shall establish by October 1, 1991, an orderly 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 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. RCW 36.70A.370(1), (2).

CAO regulations must comply with the Takings and Due Process Clauses of the Federal and State Constitutions. *See* Wash. Const. art. I, 16 (No private property shall be taken or damaged for public or private use without just compensation having been first made . . . ); U.S. Const. Amend. V, cl. 4; U.S. Const Amend XIV.

Therefore, it is essential that the County make a real effort to consider and balance property rights as part of the planning process. Failure to do so may expose the County and its taxpayers to expensive litigation and liability. A CAO regulation that violates the Takings or Due Process Clause or RCW 82.02.020 will either be invalidated or will require the government to pay just compensation. *See Dunlap v. City of Nooksack*, (Div. I, Court of Appeals, 2010) (holding that stream buffers effected a total taking of residential lot where applied to reduce buildable area to approximately 480 square feet).

*“Factors to Consider in a Regulatory Takings Analysis.*  
*Regulatory action that deprives property of all value constitutes a taking of that property. Where there is less than a complete deprivation of all value, a court will evaluate whether a taking has occurred by balancing the economic impact against two other factors: (1) the extent to which the government’s action impacts legitimate and long-standing expectations about the use of the property; and (2) the character of the government’s actions — is there an important interest at stake and has the government tended to use the least intrusive means to achieve that objective?”* (Attorney General’s Advisory Memorandum 2006)

The San Juan County Vision statement says, “Through innovative land use strategies, our citizens and institutions balance and protect private property rights, public rights, and our natural environment.” Local land use policies echo this theme:

“... Regulate development in a manner which will protect both the rights of private landowners and the interests of the public.”<sup>7</sup>

“Balance the public's interest in the management of community growth and its associated impacts, with the protection of individual property rights through adoption of a coordinated set of goals, policies and regulations to guide future development in the County.”<sup>8</sup>

“The Land Use Element establishes a concept of how San Juan County should grow and develop while protecting its exceptional quality of life and natural environment and equitably sharing the public and private costs and benefits of growth. The concept establishes the overall direction for guiding residential, commercial, and industrial growth in a manner that protects public health and safety and private property rights while preserving rural character and our unique island atmosphere.”<sup>9</sup>

“Allow for use of property to the greatest extent possible while protecting Critical Area functions and values.”<sup>10</sup>

The County’s vision statement and policies acknowledge the need for sensitivity in handling private property rights. The future of the County’s management of property rights will require recognition of the importance of flexible approaches, addressing existing uses, and clearly identifying and communicating public interests that tend to lead to regulation that may impact property rights. Solutions should be non-regulatory when possible. There must be emphasis on specific and quantifiable regulatory need, clarity, fairness, and consistency that demonstrates an effort to find the balance required by the GMA.

### **3. GMA Goal #7: Fairness in the Permit Process**

Predictability and fairness in the permitting process is required by GMA goals. *“Applications for both state and local government permits should be processed*

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<sup>7</sup> SJCCP 2.2.A, General Goal and Policies

<sup>8</sup> SJC Comprehensive Plan, 2.2.1.

<sup>9</sup> SJC Comprehensive Plan, 2.2.1.B Land Use Concept

<sup>10</sup> (2.5.B Goal 2.)

*in a timely and fair manner to ensure predictability.*<sup>11</sup> Property owners should not be subjected to months or even years of delays as they enter into a maze of complex and expensive regulations that include mitigation plans, easements, and years of intrusive experimental monitoring that interferes with their basic right to exclude others from their private property.

*“The Legislature considered this new requirement an important step towards regulatory reform and making timely project permitting decisions. Local governments’ understanding of where on the landscape critical areas occur, how they naturally function, and how best to regulate land uses that may impact critical areas natural processes is important in ensuring that zoning and project permit decisions are being made without the need to complete expensive environmental review and new studies at the permit level. Good upfront planning and the adoption of scientifically defensible development standards should lead to quicker permit decisions.”*<sup>12</sup>

#### **4. GMA Goal #4: Housing**

Legislators must not adopt codes that drive up the cost of housing for one group of property owners while subsidizing those costs for others. Additionally they must not cause existing homes to become non-conforming and eventually eliminated. The law states, *“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.”*<sup>13</sup>

Regulations designed to limit the supply of housing have been proven to substantially increase their cost.

*“Aside from demand factors, housing prices are found to be associated with cost-increasing land use regulations (approval delays) and statewide growth management. For example, after accounting for inflation, regulations are associated with a \$200,000 (80 percent) increase in Seattle’s housing prices since 1989, while housing demand raised prices by \$50,000. This constitutes about 44 percent of the cost of a home in 2006.”*<sup>14</sup>

It can be argued that San Juan County has some of the more stringent land use regulations in Washington and are now contemplating adding more.

Local regulations in the SJCCP must also be followed in this process. “To ensure that housing may be developed within a regulatory environment marked by

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<sup>11</sup> (RCW 36.70A.020 (7))

<sup>12</sup><http://www.commerce.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&alias=CTED&lang=en&ItemID=976&Mid=944&wversion=Staging>

<sup>13</sup> (RCW 36.70A.020 (4))

<sup>14</sup> *Growth Management, Land Use Regulations, and Housing Prices: Implications for Major Cities in Washington State.* Theo S Eicher 2008

clearly written standards and easily understood expectations backed by an effective, rigorous but adaptable enforcement code. Ensure that County policies, codes, and regulations do not restrict, prohibit or substantially increase the cost of establishing a variety of housing types “(SJC 5.2.C 2.)

### **Respect the People and the Place**

The Growth Management Act is not a centralized planning model. Contrary to the efforts of the state agencies, it does not attempt to legislate a one size fits all ordinance for the protection of critical areas of the state. Instead, it sets up planning goals and requires counties and cities to consider their local circumstances, weigh the goals, and find regulation that fits their own unique circumstance. It recognizes that the uniqueness of an area calls for specific handling of the issues. It encourages government to nurture flexible approaches and innovation and honor local processes and decision-making.

Our elected officials take an oath to protect and uphold our constitutional rights. In return the people consent to be governed as a regulated community in a fair manner with respect to our rights. It is in this context that our County Council should seek to balance the competing goals of GMA in an open and transparent way. The end result of the balancing process, giving real consideration to the competing goals of the GMA, can be management and protection without causing undue burden to the citizens, the community and the economy.

On Behalf of the CAPR San Juan Board,

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