

Death by SEPA: Substantive Denials Under Washington's State Environmental Policy Act

1. INTRODUCTION

The State Environmental Policy Act of 1971¹ is the State of Washington's most pervasive environmental law. In fact, a strong case can be made that SEPA is Washington's most pervasive law of any kind² because SEPA authority overlays and supplements all other state statutory authority.³ SEPA establishes broad environmental purposes and policies for the State of Washington⁴ and requires all policies, regulations, and laws of the State to be interpreted in accordance with the policies of SEPA.⁵ In its earliest SEPA decisions, the Washington

1. WASH. REV. CODE § 43.21C (1989) (1971 Wash. Laws ex.s.ch. 109) (hereinafter "SEPA").

2. See R. SETTLE, *THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT: A LEGAL AND POLICY ANALYSIS* 1-4 (1987).

3. See WASH. REV. CODE § 43.21C.030(1) (1989); *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wash. 2d 475, 490, 513 P.2d 36, 46 (1973).

4. The general policies of SEPA are set out at WASH. REV. CODE § 43.21C.020(2) (1989), which provides as follows:

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

5. WASH. REV. CODE § 43.21C.030; *Eastlake Community Council*, 82 Wash. 2d at 490, 513 P.2d at 46.

Supreme Court recognized SEPA as "a legislative mandate of the ecological ethic"⁶ and has generally given SEPA a broad and liberal interpretation. Thus, SEPA potentially affects virtually everything done by local governments and other agencies of state government.

Procedurally, SEPA requires government agencies to determine and analyze a proposal's probable significant environmental impacts.⁷ The term "agency" means almost every unit of state or local government that makes decisions or takes actions that might significantly affect the environment.⁸ This includes, but is not limited to, such diverse agencies as sewer districts, school districts, city and county councils, boundary review boards, and hearing examiners. "Proposals" include not only actions that the agency itself plans to undertake, but also any actions proposed by applicants seeking agency approvals.⁹ Building permit applications and subdivision plat applications are typical of this latter type of proposal. When the probable impacts of a proposal cross the threshold of environmental significance, SEPA requires the agency to prepare an Environmental Impact Statement¹⁰ to inform agency action on the proposal.¹¹

The first few judicial decisions under SEPA tended to focus on whether SEPA even applied to the matter in question.¹² Most of the later decisions were concerned with whether an EIS was required¹³ or whether a prepared EIS was

6. *Stempel v. Dep't of Water Resources*, 82 Wash. 2d 109, 117, 508 P.2d 166, 171 (1973) (the first Washington Supreme Court decision to construe SEPA).

7. "Significant" as used in SEPA means a reasonable likelihood of more than a moderate impact on environmental quality. WASH. ADMIN. CODE § 197-11-794 (1989); see *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wash. 2d 267, 276-78, 552 P.2d 674, 679-80 (1976).

8. See WASH. ADMIN. CODE § 197-11-714. Noteworthy exclusions include the state legislature and judiciary.

9. See WASH. ADMIN. CODE § 197-11-784.

10. Hereinafter "EIS". The content and preparation of the EIS are subject to a substantial body of regulations. See WASH. ADMIN. CODE §§ 197-11-400 to -460 (1989).

11. See WASH. REV. CODE § 43.21C.030(2)(c); It should be noted that SEPA contains a large number of exceptions to its operation. See WASH. REV. CODE §§ 43.21C.035—.037; WASH. ADMIN. CODE §§ 197-11-800 to -890; see generally, Rodgers, *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 44-47 (1984).

12. *E.g.*, *Loveless v. Yantis*, 82 Wash. 2d 754, 513 P.2d 1023 (1973); *Eastlake Community Council v. Roanoke Assocs.*, 82 Wash. 2d 475, 513 P.2d 36 (1973); *Stempel v. Dept. of Water Resources*, 82 Wash. 2d 109, 508 P.2d 166 (1973).

13. *E.g.*, *Sisley v. San Juan County*, 89 Wash. 2d 78, 569 P.2d 712 (1977); *Norway Hill Preservation and Protection Ass'n v. King County*, 87 Wash. 2d 267, 552 P.2d 674 (1976); *Richland Homeowner's Preservation Ass'n v. Young*, 18 Wash. App. 405, 568 P.2d 818 (1977).

adequate.¹⁴ As the law has become more settled, litigation over procedural compliance with SEPA has become less frequent. This is largely the result of new statutory amendments enacted in 1977 and 1983¹⁵ and the SEPA Rules adopted in 1984.¹⁶ Accordingly, in recent years, judicial attention has increasingly turned to challenges of agency substantive SEPA authority.¹⁷

SEPA is an integral part of the substantive decision-making of agencies and, as such, interjects an element of environmental discretion into the substance of agency decisions.¹⁸ SEPA specifically authorizes agencies to impose conditions upon or, more dramatically, to deny a proposal completely on the basis of that proposal's adverse environmental impacts.¹⁹ Under current law, an agency may impose reasonable, feasible conditions upon a proposal only to mitigate specific adverse environmental impacts identified in an environmental docu-

14. *E.g.*, *Barrie v. Kitsap County*, 93 Wash. 2d 843, 613 P.2d 1148 (1980); *Cheney v. City of Mountlake Terrace*, 87 Wash. 2d 338, 552 P.2d 184 (1976).

15. 1977 Wash. Laws ex.s.ch. 278; 1983 Wash. Laws ch. 117 (both codified at WASH. REV. CODE § 43.21C).

The requirements of these amendments provide specific procedural rules and safeguards for the exercise of SEPA denial authority and clarify, but do not limit, prior case law. See WASHINGTON STATE LEGISLATURE, TEN YEARS' EXPERIENCE WITH SEPA, FINAL REPORT OF THE COMMISSION ON ENVIRONMENTAL POLICY, at 38-39 (1983) ("SEPA is more than a disclosure law and . . . grants agencies authority over public and private proposals. This corresponds with existing case law. . . .")

16. Codified at WASH. ADMIN. CODE § 197-11 (1989).

17. Five of the eight published appellate opinions on substantive SEPA have been decided since 1986: *Cougar Mountain Assocs. v. King County*, 111 Wash. 2d 742, 765 P.2d 264 (1988); *Nagatani Bros. v. Skagit County Bd. of Comm'rs.*, 108 Wash. 2d 477, 739 P.2d 696 (1987); *Victoria Tower Partnership v. City of Seattle*, 49 Wash. App. 755, 745 P.2d 1328 (1987); *West Main Associates v. City of Bellevue*, 49 Wash. App. 513, 742 P.2d 1266 (1987), *review denied*, 112 Wash. 2d 1009 (1989) ("West Main II"); *Prisk v. City of Poulsbo*, 46 Wash. App. 793, 732 P.2d 1013 (1987).

The three earlier substantive SEPA cases were Dep't of Natural Resources v. Thurston County, 92 Wash. 2d 656, 601 P.2d 494 (1979); *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978); *Cook v. Clallam County*, 27 Wash. App. 410, 618 P.2d 1030 (1980).

A ninth substantive SEPA case was recently decided by the Washington Court of Appeals, Division Two, on May 11, 1989, but the court subsequently withdrew its opinion and affirmed the superior court in an unpublished opinion. The case is currently before the Washington Supreme Court on petition for review. *Levine v. Jefferson County*, 54 Wash. App. 88, 772 P.2d 528 (1989), *opinion withdrawn* (January 24, 1990), *aff'd*, 57 Wash. App. 1002 (1990), *petition for review granted*, Wash. Sup. Ct. No. 57059-1 (June 5, 1990).

See Wilson, *The SEPA Death Penalty: Project Denial Under SEPA's Substantive Authority*, LAND USE IN THE AGE OF GRIDLOCK, THE CONTINUING EDUCATION COMM. OF THE WASH. STATE BAR ASS'N at 7-3 (1989).

18. See *Polygon Corp. v. Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

19. WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660 (1989).

ment.²⁰ An agency may deny a proposal only if that proposal will result in significant adverse environmental impacts identified in an EIS and if reasonable mitigation measures will not mitigate the identified impacts.²¹ Both conditions and denials must be based on policies formally adopted by the agency as a basis for exercising substantive SEPA authority.²² Two recent Washington decisions have raised the question of what constitutes a proper substantive SEPA denial of an otherwise conforming building permit or plat application and have helped to draw the line between proper and improper denials under substantive SEPA.²³

*West Main Assocs. v. Bellevue*²⁴ (hereinafter "*West Main II*") concerned the Bellevue City Council's denial of a proposal to construct a large residential, retail and office complex. The proposal was permissible under the applicable zoning, but the Council denied building permit approval under its SEPA authority. Division One of the Washington Court of Appeals upheld the Council's denial.²⁵

The second case, *Cougar Mountain Assocs. v. King County*,²⁶ concerned the King County Council's SEPA-based denial of a subdivision plat application. Here again, the proposal conformed to all applicable plat regulations,²⁷ but the county denied the application under its substantive SEPA

20. WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660 (1989) (Conditions may be based on an EIS but are more frequently based on an environmental checklist or determination of nonsignificance (DNS)).

21. WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660 (1989) (Denials must be based on a final or supplemental EIS, not a draft EIS).

22. WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660 (1989).

23. SEPA's substantive authority allows agencies to *condition* as well as to *deny* proposals. WASH. REV. CODE § 43.21C.060. This Comment analyzes only SEPA denials. Similar issues are involved when substantive SEPA authority is used to condition proposals. However, the conditioning of proposals raises several difficult, additional questions: What is a reasonable mitigating measure? When is the mitigation capable of being accomplished? When does a condition become so severe as to amount to a denial? What are the limits of the requirement that conditions may be imposed only to the extent attributable to the identified adverse impacts?

24. 49 Wash. App. 513, 742 P.2d 1266 (1987), *review denied*, 112 Wash. 2d 1009 (1989).

25. *Id.*

26. 111 Wash. 2d 742, 765 P.2d 264 (1988).

27. See WASH. REV. CODE § 58.17.110 and .140 (1989). When agencies approve subdivision plat applications, unlike building permits, they have the power to inquire into and require appropriate provisions for the public health, safety and general welfare. This must be done within a 90-day period unless an EIS is required. In *Cougar Mountain* the issues before the court involved the council's SEPA discretion, not any discretion the county had under § 58.17.140.

authority. However, in *Cougar Mountain*, the Washington Supreme Court overturned the Council's denial.²⁸

This Comment seeks to answer the question raised by *West Main II* and *Cougar Mountain* of what procedural processes and substantive policies may be used in SEPA-based denials. After examining the nature of substantive SEPA authority and the relationship between substantive SEPA and Washington's vested rights doctrine, the Comment will discuss *West Main II* and *Cougar Mountain* and will argue that the two cases are consistent. It will then provide an informative assessment of the current limits of substantive SEPA authority. The Comment concludes by suggesting the following legislative or judicial changes in SEPA law: earlier vesting of SEPA policies, greater incorporation of environmental concerns into regulatory codes, and restrictions on the content of agency SEPA policies. These changes would create more certainty for property owners, but at the same time, would retain sufficient flexibility for local governments using SEPA to control the environmental impacts of land use decisions.

II. THE NATURE OF SUBSTANTIVE SEPA AUTHORITY

The Environmental Impact Statement is the heart of SEPA's procedural mandate to provide agency decision-makers with full environmental information.²⁹ The EIS is also the basis for agency denials of proposals under substantive SEPA authority.³⁰ SEPA requires preparation of an EIS only for proposed non-exempt³¹ major actions³² that would significantly

28. *Cougar Mountain*, 111 Wash. 2d at 743, 765 P.2d at 265.

29. See *Juanita Bay Valley Community Ass'n v. Kirkland*, 9 Wash. App. 59, 68, 510 P.2d 1140, 1146 (1973).

30. See WASH. REV. CODE § 43.21C.060(1); WASH. ADMIN. CODE § 197-11-660(b). Note that an EIS is not necessary for an agency to impose conditions upon proposals under substantive SEPA. Conditions may be imposed upon the basis of any environmental document prepared pursuant to SEPA, most commonly an Environmental Checklist or a DNS. WASH. REV. CODE § 43.21C.060.

31. See WASH. REV. CODE § 43.21C.030(2)(c); It should be noted that SEPA contains a large number of exceptions to its operation. See WASH. REV. CODE §§ 43.21C.035—.037; WASH. ADMIN. CODE §§ 197-11-800 to -890; see generally, Rodgers, *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 44-47 (1984).

32. "Major action" was first construed as an action that is discretionary and non-duplicative. *E.g.*, *Eastlake Community Council v. Roanoke Assocs.*, 82 Wash. 2d 475, 489-90, 513 P.2d 36, 46 (1973). The 1984 SEPA Rules have made it clear that "major action" means only an action likely to have a significant adverse environmental impact and that "major" has no meaning independent of "significant." WASH. ADMIN. CODE § 197-11-764.

affect the environment.³³ An action significantly affects the environment whenever a greater than moderate effect on the quality of the environment is a reasonably probable result of the action.³⁴

Having recognized a clear legislative intent that all agencies of state government undertake full consideration of environmental values and consequences, the courts have set this threshold requirement rather low and given SEPA a broad and vigorous construction.³⁵ In keeping with this policy, no particular quantum of evidence is required to support the finding of an adverse impact,³⁶ and a wide variety of impacts to both the natural environment and the built environment may be considered.³⁷ Thus, SEPA undertakes to insure full disclosure and consideration of environmental values, without mandating a particular substantive result.³⁸

There was some debate after SEPA was first enacted³⁹ about the extent to which agencies could make substantive decisions based upon the environmental information disclosed by the EIS.⁴⁰ The Washington Supreme Court foreclosed this debate and unequivocally recognized substantive SEPA author-

33. See WASH. REV. CODE § 43.21C.030(c).

34. WASH. ADMIN. CODE § 197-11-794; *Swift v. Island County*, 87 Wash. 2d 348, 358, 552 P.2d 175, 181 (1976); *Norway Hill Preservation and Protection Ass'n v. King County*, 87 Wash. 2d 267, 276-78, 552 P.2d 674, 680 (1976).

35. See WASH. REV. CODE § 43.21C.030; *Sisley v. San Juan County*, 89 Wash. 2d 78, 82, 566 P.2d 712, 715 (1977); *Norway Hill*, 87 Wash. 2d at 277, 552 P.2d at 680; *Eastlake*, 82 Wash. 2d at 490, 513 P.2d at 46.

36. *Cook v. Clallam County*, 27 Wash. App. 410, 414, 618 P.2d 1030, 1033 (1980).

37. See WASH. ADMIN. CODE § 197-11-444 (setting out an exclusive but broad list of the elements of the natural environment and the built environment that should be considered in EIS preparation); see also *Buchsieb/Danard, Inc. v. Skagit County*, 99 Wash. 2d 577, 579, 663 P.2d 487, 488 (1983) (traffic impacts, incompatibility with nearby airport land use, surface water drainage problems, impacts on county sewer services, inadequate county revenues to provide public services); *Skagit County v. Dep't of Ecology*, 93 Wash. 2d 742, 749-80, 613 P.2d 115, 119-20 (1980) (impact of project as a precedent, cumulative impact of the present project plus following projects would be significant); *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 69-70, 578 P.2d 1309, 1315 (1978) (aesthetics, view blockages, out-of-scale with surrounding neighborhood, increased traffic and noise, trend to more intense land use); *West Main II*, 49 Wash. App. 513, 521-22, 742 P.2d 1266, 1271 (1987), *review denied*, 112 Wash. 2d 1009 (1989) (obstruction of public and private views, impact on a historically and culturally important area, excessive bulk and scale as compared to surrounding area, increased traffic and air pollution, shadow effects); *Cook v. Clallam County*, 27 Wash. App. 410, 415, 618 P.2d 1030, 1034 (1980) (potential pressure to alter surrounding land use, aesthetics of placing a warehouse in a residential setting).

38. See, e.g., *Norway Hill*, 87 Wash. 2d at 272-73, 552 P.2d at 677.

39. 1971 Wash. Laws ex.s.ch. 109 § 6. (codified at WASH. REV. CODE § 43.21C).

40. See *Settle*, *supra* note 2, at 224-32.

ity in the 1978 decision of *Polygon Corp. v. Seattle*.⁴¹ In *Polygon*, the City of Seattle denied on SEPA grounds a developer's permit application to construct an apartment building. The proposal conformed to the city zoning code and the permit would have been granted as of right prior to the enactment of SEPA. The court held that SEPA validly delegates a discretionary power that overlays even the purely ministerial function of permit issuance.⁴²

Under the current SEPA statute and rules, denials must be based on local agency SEPA policies that are adopted by the agency and incorporated in regulations, plans, or codes.⁴³ These policies must be formally designated by the agency as possible bases for the exercise of SEPA authority⁴⁴ and must be in effect when the DNS or DEIS is issued.⁴⁵ The statute and rules, however, give no guidance as to the content of local agency SEPA policies, and thus far, the courts have given agencies broad discretion to determine the substance of their SEPA policies.

When an agency exercises its substantive SEPA authority to deny a proposal, it must make written findings that state the decision and specify the SEPA policy bases for the denial.⁴⁶ These findings must show (1) that the proposal would result in significant adverse impacts identified in the EIS, and (2) that reasonable mitigation measures would be insufficient to avoid the identified impacts.⁴⁷ These requirements have helped to regularize and give structure to the SEPA denial process, but important questions remain. These questions include the extent of specificity in the agency's written findings; the detail required in the discussion of mitigation meas-

41. 90 Wash. 2d 59, 578 P.2d 1309 (1978).

42. *Id.* at 64, 578 P.2d at 1313.

43. WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660(1)(a); *see Cougar Mountain Assocs. v. King County*, 111 Wash. 2d 742, 752, 765 P.2d 264, 269-70 (1988).

44. WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660(1)(a); *see Cougar Mountain Assocs. v. King County*, 111 Wash. 2d 742, 752, 765 P.2d 264, 269-70 (1988).

45. WASH. ADMIN. CODE § 197-11-660(1)(a) (DNS is the threshold determination of non-significance. WASH. ADMIN. CODE § 197-11-734. DEIS is the draft environmental impact statement, which is prepared at an early stage under agency authority and circulated to other agencies with jurisdiction or expertise for comment. WASH. ADMIN. CODE § 197-11-455.)

46. WASH. ADMIN. CODE § 197-11-660(1)(b); *see Cougar Mountain*, 111 Wash. 2d at 755, 765 P.2d at 271.

47. WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660(1)(f).

ures; whether limitations exist on the types of policies that may permissibly be adopted as agency SEPA policies; whether SEPA policies may be so broad as to be unconstitutionally vague; whether an agency may be allowed to adopt SEPA policies which are contradictory; and whether substantive due process imposes fairness limits on the denial process.

These questions are especially important in the area of private land development regulation because one of substantive SEPA's most important and most controversial uses has been the condition and denial of subdivision and plat applications. To date, all of the substantive SEPA cases to reach the appellate courts have involved the conditioning or denying of building permits or plat applications by local government agencies. SEPA has been so important, and so frequently utilized, in this manner because of Washington's rather peculiar vested rights doctrine. Therefore, an understanding of the vested rights doctrine is essential to an understanding of how SEPA fits into Washington's system of land use regulation.

III. WASHINGTON'S VESTED RIGHTS DOCTRINE AND SUBSTANTIVE SEPA AUTHORITY

The State of Washington has long held to a distinctly minority position, shared by only a few other states, as to when the right to develop land vests. In most states, zoning and land use regulations may be changed up until a permit is approved and substantial reliance upon that permit has occurred.⁴⁸ Under the Washington doctrine, a developer who files a timely and complete⁴⁹ application obtains a vested right to have that

48. See *Allenbach v. City of Tukwila*, 101 Wash. 2d 193, 197, 676 P.2d 473, 475 (1984); R. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW 40 (1984) ("[T]he overwhelming majority rule is that development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in reliance on the permit. There is variation among courts adhering to the majority rule in its application. What constitutes substantial development varies significantly. Emphasizing that the public interest is subverted if developers may race to obtain building permits under zoning regulations which are about to be changed, the majority rule does not permit rights to vest against regulations which were pending before local decision makers at the time of application for the building permit, its receipt, or substantial development."); see generally, Note, *Washington's Zoning Vested Rights Doctrine*, 57 WASH. L. REV. 139 (1981).

49. See *Valley View Industrial Park v. Redmond*, 107 Wash. 2d 621, 733 P.2d 182 (1987); *Mercer Enters v. Bremerton*, 93 Wash. 2d 624, 611 P.2d 1237 (1980) (The Washington courts recognize a limited exception to the completeness requirement where the permit applicant is acting diligently in good faith and the municipality frustrates those efforts).

application processed according to the zoning and land use ordinances in effect at the date of application.⁵⁰ Even where there are new land use regulations pending, developers in Washington are allowed to "fix" the rules that govern their development by making a timely and complete application.⁵¹

The legal basis for this doctrine has been less than lucidly articulated in the decisions.⁵² One justification for the rule is to provide a bright line for administrative convenience and efficiency.⁵³ The other justifications for the rule spring from notions of fundamental fairness:⁵⁴ the vesting doctrine protects developers' valuable development rights⁵⁵ from the potentially fluctuating policies of local government. Further, the vesting doctrine allows landowners and developers to plan their conduct with reasonable certainty of the legal consequences.⁵⁶ A vested right does not, however, guarantee the right to build; the right merely establishes the ordinances with which the developer must comply. Regulatory changes occurring after the time of vesting will not apply to the project.

Such a permissive vesting rule creates a danger of developer speculation in building permits.⁵⁷ However, Washington courts have considered the costs of submitting applications and the time limitations on commencing construction to be sufficient to eliminate any need for courts to inquire into the good faith of applicants.⁵⁸ Additionally, local governments can protect themselves by adopting interim zoning measures in order

50. See *West Main Assocs. v. City of Bellevue*, 106 Wash. 2d 47, 50-51, 720 P.2d 782, 785 (1986) ("West Main I"); *Allenbach v. City of Tukwila*, 101 Wash. 2d 193, 676 P.2d 473 (1984); *State ex rel. Ogden v. Bellevue*, 45 Wash. 2d 492, 275 P.2d 899 (1954).

51. *West Main I*, 106 Wash. 2d at 51, 720 P.2d at 785.

52. See R. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW 42.

53. E.g., *Allenbach*, 101 Wash. 2d at 198, 676 P.2d at 475; *Hull v. Hunt*, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958). In *Hull*, the Washington Supreme Court expressed its preference for a rule that avoids searching through the moves and countermoves of the parties to find the date of substantial change of position that finally vests the right to develop. Vesting of development rights upon building permit application was adjudged the more practical rule to administer.

54. See *West Main I*, 106 Wash. 2d at 51, 720 P.2d at 785; see generally Hill, *Vested Rights in the Post-Modern World*, ENVIRONMENTAL AND LAND USE LAW SECTION OF THE WASHINGTON STATE BAR ASS'N 7-B3 (1986).

55. The court "recognized that '[a]lthough less than a fee interest, development rights are beyond question a valuable right in property.'" *West Main I*, 106 Wash. 2d at 50, 720 P.2d at 785 (quoting *Louthan v. King County*, 94 Wash. 2d 422, 428, 617 P.2d 977, 981 (1980)).

56. *Id.*

57. E.g., *Allenbach v. City of Tukwila*, 101 Wash. 2d 193, 199, 676 P.2d 473, 476 (1984).

58. *Id.*

to safeguard the public welfare pending completion of a new zoning scheme.⁵⁹

Another danger of such permissive vesting, not specifically addressed by the Washington courts, is that local governments will be unable to protect the public interest from development that is permitted under current zoning but does not respond to changed conditions and unforeseen circumstances. In the vast majority of states, local governments may protect this public interest by simply changing their zoning regulations prior to permit issuance and substantial reliance upon that permit by the developer.⁶⁰ Insofar as these changed or unforeseen conditions fall within SEPA's broad definition of "elements of the environment,"⁶¹ this public interest is protected in Washington by substantive SEPA authority. An otherwise acceptable project may be denied on the basis of the environmental impacts of the particular plan submitted.⁶² In this way, substantive SEPA acts as a kind of safety valve for the Washington vested rights doctrine. In fact, the central tension in the substantive SEPA cases has been between the need for local governments to retain flexibility in their decision-making by using substantive SEPA and the policies of the vested rights doctrine to protect the development rights of landowners and developers.

The vested rights doctrine, which developed as a common law rule of the Washington courts, was codified in 1987.⁶³ The new statutes specifically exempt conditions and denials imposed under SEPA authority from the operation of the vested rights doctrine.⁶⁴ Even in *West Main I*, which contains

59. *Smith v. Skagit County*, 75 Wash. 2d 715, 739, 453 P.2d 832, 846 (1969); see WASH. REV. CODE § 36.70.790.

60. See R. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW 40 (1984).

61. See WASH. ADMIN. CODE § 197-11-440.

62. *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 52, 65-66, 578 P.2d 1309, 1312-13.

63. WASH. REV. CODE § 19.27.095 (as applicable to building permits); WASH. REV. CODE § 58.17.033 (as applicable to subdivision plats).

Before the passage of § 58.17.033, the common law rule for subdivision plats was that the right to develop did not vest until ninety days after the plat permit application. Ninety days is the statutory limit for agency action under WASH. REV. CODE § 58.17.140. Seemingly, the new statute changes this common law rule and fixes the regulatory ordinances under which the plat will be considered at the time of plat application. Compare WASH. REV. CODE § 58.17.033 with *Norco Construction v. King County*, 97 Wash. 2d 680, 649 P.2d 103 (1982); *Carlson v. Beaux Arts Village*, 41 Wash. App. 402, 704 P.2d 663 (1985); *Wildner v. Winslow*, 35 Wash. App. 77, 664 P.2d 1316 (1983).

64. WASH. REV. CODE § 19.27.095(3) and WASH. REV. CODE § 58.17.033(3) ("The limitations imposed by this section shall not restrict conditions imposed under chapter 43.21C RCW.")

the Washington Supreme Court's strongest statement of the vested rights doctrine to date, the court explicitly recognized that "under the State Environmental Policy Act of 1971 a municipality has the discretion to deny an application for a building permit because of adverse environmental impacts even if the application meets all other requirements and conditions for issuance."⁶⁵

Although substantive SEPA denials are statutorily exempt from the vested rights doctrine, such denials are subject to and conditioned by the vested rights doctrine in one respect. Under the vested rights doctrine, developers who file valid permit or plat applications have a vested right to have their application processed according to the zoning and land use ordinances in effect at the time of application.⁶⁶ Recent court decisions have held, and common sense dictates, that SEPA statutes (including local agency SEPA policies) qualify as such zoning and land use ordinances.⁶⁷ This would seem to imply that all SEPA statutes and local SEPA policies must be in effect at the time of permit or plat application—the rule applicable to all other zoning and land use regulations. However, the SEPA Rules specify that SEPA denials may be based only on SEPA policies that are formally adopted and in effect at the time of the issuance of a DEIS or the DNS.⁶⁸ This provision of the SEPA Rules has never been squarely before the courts.⁶⁹ As a result, it is presently unclear exactly when SEPA policies

65. *West Main I*, 106 Wash. 2d at 53, 720 P.2d at 786 (citing *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978) and *Cook v. Clallam County*, 27 Wash. App. 410, 618 P.2d 1030 (1980)).

66. *E.g., id.* at 50-51, 720 P.2d at 785.

67. *Victoria Tower Partnership v. City of Seattle*, 49 Wash. App. 755, 761, 745 P.2d 1328, 1331 (1987).

68. WASH. ADMIN. CODE § 197-11-660.

69. See *Victoria Tower*, 49 Wash. App. at 760-61, 745 P.2d at 1331. In *Victoria Tower*, Seattle used its substantive SEPA authority to deny a building permit application for an apartment building. One of the local agency SEPA policies relied on by the city was the Multi-Family Land Use Policies of Seattle. *Victoria Tower Partnership* had applied for its building permit in August 1980; the DEIS was issued in January 1981; and the Multi-Family Land Use Policies were not adopted until July 1981. The court held that Seattle's reliance on these policies violated the vested rights doctrine and remanded the case to the Seattle City Council.

The offending local agency SEPA policies in this case were adopted after DEIS issuance, and the court expressed no opinion as to whether policies adopted after permit application but before DEIS issuance would likewise violate the vested rights doctrine. The provision in the SEPA Rules that specifies when local agency policies must be in effect did not apply because the proposal was initiated before the regulation's October 1, 1984, effective date.

must be in place to provide a basis for an exercise of substantive SEPA authority. It is clear, however, that SEPA authority, properly exercised, overlays the vested rights doctrine of Washington.

Without the vested rights doctrine, it is unlikely that cases like *Cougar Mountain* or *West Main II* would come before the courts, at least not as "environmental law" cases. Local governments would have had other "safety valves" to condition or deny problematic or unpopular building permits or subdivision plats, such as changing their substantive zoning and platting regulations.

Washington's combination of a very permissive vested rights doctrine⁷⁰ and a very strong SEPA statute, which makes even ministerial agency actions environmentally discretionary,⁷¹ is unique in the nation. The fact that Washington's system is unique does not necessarily mean that it needs change, however.⁷² Because the current system is symbiotic, a strong argument exists that using SEPA as a safety valve for the

70. Only two other states have a vested rights doctrine similar to Washington's which vest development rights upon the mere filing of a building permit application (Utah, Vermont); nine states require filing of the permit application and placement of substantial reliance upon the existing zoning laws (Florida, Illinois, Kansas, Kentucky, Maine, Nebraska, New Hampshire, North Dakota, Wisconsin); one state vests rights upon building permit issuance (Georgia); thirty-five states follow the majority rule that rights vest only after permit issuance and substantial reliance (Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, Wyoming), although in some of these states issuance alone or filing plus substantial reliance may be enough to vest rights under limited circumstances; finally, the author is unable to determine the vesting rules in two states (Alabama, South Dakota).

71. See *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978). Washington's SEPA law, as developed in case law by the Washington courts, makes formerly non-discretionary agency actions (e.g., the issuance of building permits to applications that conform to applicable zoning regulations) now discretionary if the agency decision would significantly affect the environment as broadly defined in SEPA. Of the fourteen states that have passed state environmental policy acts, only one other state takes the same position (Minnesota). The other twelve states follow the lead of the federal courts, interpreting the National Environmental Policy Act, and do not make ministerial agency actions environmentally discretionary under their SEPA statutes. (California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, South Dakota, Virginia, Wisconsin).

72. The new Washington Growth Management Act did nothing to change the vested rights doctrine. See 1990 WASH. LAWS. ch. 17. However, a recently rejected initiative launched in response to the Growth Management Act proposed to abolish the vested rights doctrine and replace it with a rule in which development rights would

problems posed by particular development and growth proposals is better than changing local land use regulations in response to individual projects. Use of the local political process to change zoning in response to particular projects encourages the sort of NIMBY (Not In My Back Yard) pressure groups to which local city and county officials are most susceptible and offers little protection to the rights of landowners planning to develop their property in reliance upon present law. On the other hand, allowing local government officials to make these same regulatory decisions by using SEPA provides the benefit of SEPA's procedural protections to the applicant. Furthermore, the SEPA decision-making process focuses the debate on SEPA's broad list of elements of the environment, which, significantly, does not include the narrow economic interests of project opponents. The limits imposed upon local governments seeking to deny projects under SEPA appear in the *West Main II* and *Cougar Mountain* decisions.

IV. WEST MAIN II

In *West Main II*,⁷³ a developer had applied for a permit to construct a 22-story mixed use building in that part of downtown Bellevue known as "Old Bellevue."⁷⁴ The Bellevue City

vest only upon issuance of a valid permit or preliminary plat approval. See 1990 Initiative Measure No. 547, lines 1321-25 (The Balanced Growth Enabling Act).

The Governor's Growth Strategies Commission has submitted a compromise proposal for legislation to change the vested rights doctrine. One likely compromise would leave the doctrine intact except in the limited case where an applicant has official notice of a pending change in zoning or other land use regulation. This would eliminate the greatest perceived unfairness of the current rule—the rush to file permit applications shortly before a new zoning or land use regulation goes into effect. See Final Report of the Wash. Growth Strategies Comm'n.

73. *West Main Assocs. v. City of Bellevue*, 49 Wash. App. 513, 742 P.2d 1266 (1987), *review denied*, 112 Wash. 2d 1009 (1988) (*West Main II*) (*West Main II* involved the same principal parties as the 1986 Washington Supreme Court case of *West Main Associates v. City of Bellevue*, 106 Wash. 2d 47, 720 P.2d 782 (*West Main I*). In *West Main I* the Washington Supreme Court held that Bellevue Ordinance 3359 unconstitutionally interfered with development rights guaranteed by the vested rights doctrine. Ordinance 3359 provided that a developer could not apply for a building permit until the developer had obtained eight preliminary permits. It further provided that no development right vested until the actual building permit application was filed. The court held that this vesting scheme was a violation of due process because these vague and discretionary pre-application procedures were unduly oppressive to individual property owners).

74. *West Main II*, 49 Wash. App. at 515, 742 P.2d at 1268 (The "Old Bellevue" Land Use District is the oldest and most historically significant part of the City of Bellevue. At the time of the City Council's decision in this case, the Old Bellevue Land Use District contained sixty existing buildings, fifty were one-story, eight were

Council disapproved the project on two separate grounds.⁷⁵ First, the council denied the application because it failed to meet certain review criteria in the Bellevue Land Use Code.⁷⁶ Second, the council denied the application under its substantive SEPA authority as inconsistent with local SEPA policies.⁷⁷ The council's objections to the proposal were similar under both grounds for denial: excessive bulk and scale as compared to the surrounding land uses in the area, adverse impacts on an important historical and cultural area, obstruction of public and private views, shadow effects, and increased traffic and its attendant pollution.⁷⁸ Upon West Main's writ of review, the Superior Court for King County declared the council's action void insofar as it was based on the Bellevue Land Use Code review criteria,⁷⁹ but the court upheld the council's exercise of substantive SEPA authority.⁸⁰ However, the superior court also found a violation of the appearance of fairness doctrine and remanded the case to the city council.⁸¹ Both parties appealed.

The court of appeals upheld the council's exercise of its substantive SEPA authority in a well-organized opinion that

two-story, one was three-story, and one was four-story. Bellevue Wash., Resolution 4619 at 7 (Sept. 11, 1985) (hereinafter resolution 4619). West Main Associates' proposed building was sited in the "Old Main" section of "Old Bellevue" - the oldest and most historic section. "While Bellevue's history is relatively short, Old Main is the only historical area Bellevue has. . . ." *Id.* at 17.)

75. *West Main II*, 49 Wash. App. at 515-16, 742 P.2d at 1268 (The council heard the case on appeal from the city planning director's decision to approve the project permit. The project had been approved by the planning director under numerous conditions. Appeal was taken to the city council by the Three Tower Legal Fund, an association of persons and community organizations opposed to the project.)

76. *Id.* at 516, 742 P.2d 1269, *see* Resolution 4619 at 7-17. (The council found that the project was not in accord with the goals and policies of the comprehensive plan, that the effect of the project on the immediate area was materially detrimental and lacked merit, and that no reasonable mitigation measures existed. The council acknowledged that a comprehensive plan by itself is not regulatory under Washington law. However, Bellevue had incorporated the goals and policies of its comprehensive plan into its land use regulatory system as ultimate standards. Resolution 4619 at 12.)

77. BELLEVUE, WASH. CITY CODE § 22.02.140; *see* Resolution 4619 at 17-27. (BCC § 22.02.140 adopts as local SEPA policies the statutory SEPA policies of WASH. REV. CODE § 43.21C.020, the policies of the Bellevue Comprehensive Plan, and the Bellevue Land Use Code, among others.)

78. *West Main II*, 49 Wash. App. at 516-17, 742 P.2d at 1268-69; *see* Resolution 4619.

79. This issue was raised by the parties on appeal but not addressed by the court. *See* Briefs of the Parties, *West Main II*, 49 Wash. App. 513, 742 P.2d 1266.

80. *West Main II*, 49 Wash. App. at 517, 742 P.2d at 1269.

81. On appeal, however, the Washington Court of Appeals found no violation of the appearance of fairness doctrine. *West Main II*, 49 Wash. App. at 527-29, 742 P.2d at 1274-75.

proceeded methodically through SEPA's statutory requirements for project denial and through the adverse impacts identified by the city in Resolution 4619.⁸² The court found that the city adequately followed the procedural requirements for a substantive SEPA denial: the city cited specific adverse impacts that were identified in the final EIS; the council cited specific local agency SEPA policies which were inconsistent with West Main Associates' proposed project; and the council adequately considered reasonable mitigation measures and found them insufficient.⁸³ The court then proceeded to West Main's arguments that the city's SEPA-based denial was nevertheless improper.

First, West Main contended that the adverse impacts had not been labelled "significant" in the EIS.⁸⁴ The court held that the SEPA statutes and Rules, fairly read, do not require an impact to be labelled "significant" in the EIS.⁸⁵ The impacts need only be identified in the EIS. Then, in order to deny the proposal, the agency must find on the basis of agency SEPA policies that the impacts identified in the EIS are significantly adverse, unmitigatable, and therefore, unacceptable.⁸⁶

Second, West Main contended that the local SEPA policies relied on by the council were not legally valid bases for the exercise of SEPA authority. Specifically, West Main objected to the use of Comprehensive Plan policies, provisions of the Land Use Code, and the general policies of SEPA.⁸⁷

In its objection to the use of Comprehensive Plan policies

82. The opinion was authored by retired supreme court Justice Williams for a three judge panel sitting as court of appeals judges pro tempore in Division One. The other judges were sitting supreme court Justice Callow and superior court Judge Thibodeau.

83. *West Main II*, 49 Wash. at 520-23, 742 P.2d at 1270-72; see WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660.

84. *West Main II*, 49 Wash. App. at 523, 742 P.2d at 1272; see Opening Brief of Appellant, 42-45, *West Main II*, 49 Wash. App. 513, 742 P.2d 1266.

85. *West Main II*, 49 Wash. App. at 523, 742 P.2d at 1272; see WASH. REV. CODE § 43.21C.030(2)(c) (requiring an EIS for actions "significantly affecting the quality of the environment."); WASH. REV. CODE § 43.21C.031 (requiring an EIS for "only those probable adverse environmental impacts which are significant."); WASH. ADMIN. CODE § 197-11-400(2) ("An EIS shall provide impartial discussion of significant environmental impacts. . . ."); WASH. ADMIN. CODE § 197-11-402(3) ("Discussion of insignificant impacts is not required; if included, such discussion shall be brief and limited to summarizing impacts or noting why more study is not warranted.")

86. See *West Main II*, 49 Wash. App. at 523, 742 P.2d at 1272; WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660.

87. *West Main II*, 49 Wash. App. at 523-24, 742 P.2d at 1272; See Opening Brief of Appellant at 46-49, *West Main II*, 49 Wash. App. 513, 742 P.2d 1266.

as SEPA policies, West Main relied primarily on language in the Washington Optional Municipal Code,⁸⁸ as well as a string of non-SEPA zoning cases.⁸⁹ These cases hold that specific zoning provisions cannot be overridden by conflicting provisions of a comprehensive plan because a comprehensive plan has no regulatory effect.⁹⁰ West Main argued that the Bellevue City Council violated this statute and case law when it used the policies of the comprehensive plan "under the guise of SEPA" in order to regulate specific zoning.⁹¹ The court held that this was not a case where a comprehensive plan was being given regulatory effect. Rather, Bellevue had expressly adopted the comprehensive plan as a local SEPA policy and was entitled to rely on those SEPA policies to inform its action on West Main's proposal.⁹² Thus, the comprehensive plan was not given independent regulatory effect; rather, Bellevue used its authority to deny under SEPA. The comprehensive plan policies were only used as validly adopted SEPA policies to provide guidance to the city in the exercise of its substantive SEPA authority.⁹³

West Main also objected to the council's use of general provisions of its Land Use Code as local SEPA policies in denying the proposal.⁹⁴ West Main argued that it was unfair to give

88. See WASH. REV. CODE § 35A.63.080 (1989), the Optional Municipal Code under which Bellevue derived its authority to regulate land use. The statute provides that a comprehensive plan serves as a basic source of reference for future legislative and administrative actions, but "the comprehensive plan shall not be construed as a regulation of property rights or land uses."

89. See Opening Brief of Appellant at 47, *West Main II*, 49 Wash. App. 513, 742 P.2d 1266.

90. *E.g.*, *Barrie v. Kitsap County*, 93 Wash. 2d 843, 613 P.2d 1148 (1980) (Kitsap County zoned pursuant to the Planning Enabling Act, WASH. REV. CODE § 36.70 (1989). Under the Act, the comprehensive plan is only a guide to development and adoption of specific controls and has no regulatory effect. Zoning ordinances need not strictly adhere to the comprehensive plan.); *Carlson v. Beaux Arts Village*, 41 Wash. App. 402, 704 P.2d 663 (1985) (A comprehensive plan is "no more than a general guide to the later adoption of official controls which is subordinate to specific zoning regulations." *Id.* at 408, 704 P.2d at 666); *Wildner v. Winslow*, 35 Wash. App. 77, 664 P.2d 1316 (1983) (Winslow zoned pursuant to the Optional Municipal Code, like Bellevue. "A comprehensive plan is no more than a general policy guide to the later adoption of official controls; it is not given preference over specific zoning regulations." *Id.* at 79, 664 P.2d at 1317.)

91. *West Main II*, 49 Wash. App. at 526, 742 P.2d at 1274; Opening Brief of Appellant at 45-47, *West Main II*, 49 Wash. App. 513, 742 P.2d 1266.

92. *West Main II*, 49 Wash. App. at 524-25, 742 P.2d at 1273.

93. *Id.*

94. The City Council cited § 20.10.370A.5 of the Bellevue Land Use Code, which sets forth the purpose of the "Old Bellevue" Land Use District. Resolution 4619 at 23.

these general policy statements of the Land Use Code regulatory effect when West Main's proposed project was permissible under the more specific zoning regulations that adopted pursuant to those same general policy statements.⁹⁵ Again, the court ruled against West Main, holding that the Land Use Code policies were not being used to regulate. Rather, they were validly adopted SEPA policies which could be used by the Council to provide guidance in the exercise of its SEPA authority.⁹⁶

Finally, West Main objected to Bellevue's adoption and use of the general and broad language of SEPA's general policy statement.⁹⁷ West Main argued that this exceedingly general language was not a proper basis for denial of a project because it provided no guidance.⁹⁸ Ruling once more against West Main, the court noted that SEPA expressly directs that "[t]he policies, regulations, and laws of the state of Washington shall be administered in accordance with the policies set forth in this chapter. . . ."⁹⁹ The court cited *Polygon*, the leading substantive SEPA case, in which the Washington Supreme Court specifically approved the use of the general policy provisions of SEPA to deny a project proposal.¹⁰⁰ In *Polygon*, the court held that the general policies of SEPA may be used as local SEPA policies and that they "provide a valid basis for declaring environmental impacts unacceptable in a particular case."¹⁰¹

In sum, the *West Main II* court held that the procedure used by the Bellevue City Council in its SEPA-based denial of West Main's proposal was proper. The written findings of the city are, in fact, an excellent example of findings that adequately discuss and reference the significant adverse impacts disclosed by the EIS, which local agency SEPA policies were offended by the impacts, and why reasonable mitigation measures would be insufficient to adequately mitigate those impacts.¹⁰² The opinion declined to place any restrictions whatsoever upon the substance of the local agency's SEPA policies, allowing local governments to adopt and use language

95. See Opening Brief of Appellant at 51, *West Main II*, 49 Wash. App. 513, 742 P.2d 1266.

96. *West Main II*, 49 Wash. App. at 526, 742 P.2d at 1274.

97. See WASH. REV. CODE § 43.21C.020(2)(b) and (d). See *supra* note 4 for the full text of 43.21C.020(2).

98. *West Main II*, 49 Wash. App. at 526-27, 742 P.2d at 1274.

99. WASH. REV. CODE § 43.21C.030(1).

100. *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

101. *West Main II*, 49 Wash. App. at 527, 742 P.2d at 1274.

102. See Resolution 4619.

from comprehensive plans, land use codes, and the broad language of the SEPA statute to deny proposals.

Division One of the Washington Court of Appeals decided *West Main II* on September 28, 1987. *West Main Associates* subsequently petitioned for review by the Washington Supreme Court. Meanwhile, *Cougar Mountain Assocs. v. King County*,¹⁰³ another substantive SEPA case with remarkably similar issues, had been slowly proceeding through the land use system's maze of administrative and judicial appeals. The supreme court considered *West Main's* petition for review on January 5, 1988, and deferred the petition pending final determination of *Cougar Mountain*.¹⁰⁴

V. COUGAR MOUNTAIN

In *Cougar Mountain Associates v. King County*,¹⁰⁵ the Washington Supreme Court reviewed a SEPA-based denial of a developer's subdivision plat application that otherwise conformed to all land use regulations.¹⁰⁶ Finding that the King County Council had exercised its substantive SEPA authority improperly, the court remanded the case for further consideration by the council.¹⁰⁷

103. 111 Wash. 2d 742, 765 P.2d 264 (1988).

104. Letter from Reginald D. Shriver, Supreme Court Clerk, to the parties of *West Main II* (January 5, 1988) (Reference to Supreme Court No. 54520-1). After the *Cougar Mountain* decision on December 15, 1988, the Washington Supreme Court returned to *West Main's* petition, which had been awaiting the decision of the *Cougar Mountain* case for a year, and denied the petition. 112 Wash. 2d 1009 (March 10, 1989).

105. 111 Wash. 2d 742, 765 P.2d 264 (1988).

106. Agency approvals of subdivision plat applications have always been more discretionary than building permit applications. See WASH. REV. CODE § 58.17.110 (1989). An agency may always disapprove a plat that fails to involve sufficient provisions for public use and interest. *Id.* This was not an issue in *Cougar Mountain*.

107. *Cougar Mountain*, 111 Wash. 2d at 743, 765 P.2d at 265 (Note that *Cougar Mountain's* legal victory was largely Pyrrhic. The disposition of the case was simply reversal of the superior court decision with instructions to remand to the King County Council for reconsideration. The court did not grant the relief requested by appellant *Cougar Mountain Associates*—a court order for King County either to grant the plat application or to notify *Cougar Mountain* of the changes necessary to obtain plat approval under the zoning at the time of permit application. See Opening Brief of Appellant at 51, *Cougar Mountain*, 111 Wash. 2d 742, 765 P.2d 264 (1988)).

The *Cougar Mountain* case provides an excellent example of how appellants from an administrative agency action, who win their legal battle, still face a long, slow war of attrition because their remedy is almost always remand from whence they came. Upon remand in *Cougar Mountain*, the superior court referred the issue back to the King County Council for reconsideration. The council in turn remanded to the Hearing Examiner for preparation of an addendum to the EIS to develop further information concerning the environmental impacts on Ames Creek, salmon, wetlands,

In July of 1982, Cougar Mountain Associates sought preliminary plat approval to develop 101 single family residential lots on a 135-acre parcel of land.¹⁰⁸ The property was zoned "G" with a maximum density of one dwelling unit per acre. In contrast, the King County Comprehensive Plan (both the 1964 and 1985 versions) recommended a maximum density of only one dwelling unit per 5 acres.¹⁰⁹ A DEIS was issued in September of 1985 that discussed the significant impacts of erosion and surface water runoff into a neighboring wetland, impacts on fish and wildlife, impacts on land use, and impacts on public services and utilities.¹¹⁰ The King County Building and Land Development Division originally recommended approval of the project as conditioned (90 lots on 128 acres), but the King County Zoning and Subdivision Examiner recommended denial because the proposal conflicted with the King County Comprehensive Plan, the Agricultural Preservation Program, provisions of the King County Zoning Code, and the policies of SEPA.¹¹¹ Cougar Mountain appealed to the King County Council, and the council upheld the Examiner's decision. In denying the appeal, the council passed Ordinance 7811 in October of 1986, a document of less than one page which adopted

erosion, water runoff, and public facilities. (N.B. Applicants routinely bear the cost of EIS preparation). The Examiner then remanded to the Bureau of Land Use and Development (BALD) for preparation of the EIS addendum. Cougar Mountain Associates filed a writ of review challenging the required EIS addendum, and the superior court ruled in early 1989 that the addendum could be required but that the county had to produce the addendum by September 1989. The addendum was finally issued in December 1989; the Subdivision Technical Committee of BALD issued its report in February 1990; and public hearings were commenced on February 22, 1990. Eight additional hearings, were held through March, April, and May. The Hearing Examiner finally recommended approval of the plat on June 29, 1990. By this time Cougar Mountain had again downsized their proposal to 63 lots on 128 acres with significantly greater setbacks from the most environmentally sensitive areas. See OFFICE OF THE ZONING AND SUBDIVISION EXAMINER, REPORT AND RECOMMENDATION TO THE KING COUNTY, WASH., COUNCIL (June 29, 1990) (BALD no. 1082-83, Proposed Plat of Ames Lake Hills). At least six separate appeals of the decision of the Hearing Examiner have been filed to the King County Council, and it is anticipated that the council will hear this new appeal of Cougar Mountain's 1982 plat application by late fall of 1990.

108. *Cougar Mountain*, 111 Wash. 2d at 743-44, 765 P.2d at 265.

109. *Id.* at 745, 765 P.2d at 266.

110. *Id.* at 745, 765 P.2d at 266; see King County, Wash., Ordinance 7945 (February 2, 1987). The proposed site bordered on and drained into Ames Lake Wetland No. 57, a breeding ground for migratory fowl and resident wildlife. Ames Creek, a significant salmon spawning stream, flows through the wetland.

111. *Cougar Mountain*, 111 Wash. 2d at 745-46, 765 P.2d at 266-267.

and incorporated the Examiner's findings and conclusions.¹¹² In November of 1986, Cougar Mountain Associates sought review in King County Superior Court.¹¹³

In February of 1987, less than four weeks before trial, the council decided that Ordinance 7811 did not accurately reflect the reasons for the council's denial. As a result, the council amended Ordinance 7811 and entered new findings and conclusions in Ordinance 7945.¹¹⁴ Ordinance 7945 denied Cougar Mountain's project "[b]ased upon the environmental impacts of the proposed development. . . ."¹¹⁵ After the superior court found for King County, Cougar Mountain's direct appeal to the Washington Supreme Court was accepted.

Cougar Mountain argued strongly on appeal that the manner of this "post hoc justification," taken months after the council's original decision, was irregular and should be declared unlawful.¹¹⁶ However, an agency is generally not required to enter findings contemporaneously with its decision and such late adoptions are not per se error absent a showing of prejudice by plaintiff.¹¹⁷ The supreme court's opinion failed to mention the issue and did not suggest any prejudice on the part of the council.¹¹⁸ Thus, it would be purely speculative to suggest that the late adoption of findings entered into the court's decision.

The first issue that the *Cougar Mountain* court discussed was the appropriate standard of judicial review.¹¹⁹ Ordinarily, agency action is reviewed under the deferential "arbitrary and capricious" standard.¹²⁰ However, earlier SEPA cases reasoned that the policies of SEPA were of particular importance to the

112. *Cougar Mountain*, 111 Wash. 2d at 746, 765 P.2d at 266; King County, Wash., Ordinance 7811 (October 6, 1986).

113. *Cougar Mountain Assocs. v. King County*, No. 86-2-23945-6 (King County Super. Ct. April 14, 1987).

114. King County, Wash., Ordinance 7945 (February 2, 1987); see *Cougar Mountain* 111 Wash. 2d at 746, 765 P.2d at 266; Opening Brief of Appellant at 19-20, *Cougar Mountain*, 111 Wash. 2d 742, 765 P.2d 264.

115. King County, Wash., Ordinance 7945 at 1 (January 26, 1987).

116. See Opening Brief of Appellant at 27-33, *Cougar Mountain*, 111 Wash. 2d 742, 765 P.2d 264 (arguing that the council's actions offended due process and urging the court to adopt a rule making findings of fact in land use adjudications non-revisable except for minor errors).

117. See *West Hill Citizens v. King County*, 29 Wash. App. 168, 627 P.2d 1002 (1981).

118. See *Cougar Mountain*, 111 Wash. 2d at 746, 765 P.2d at 266.

119. *Id.* at 747-50, 765 P.2d at 267-69.

120. See *infra* note 170 for a discussion of the arbitrary and capricious standard of review.

legislature and that the broader scrutiny of the "clearly erroneous" standard was appropriate when reviewing the issuance of a DNS.¹²¹ Likewise, the court in *Polygon* held that the clearly erroneous standard was appropriate for review of a substantive SEPA denial of a building permit.¹²² However, the standard of review for the denial of a subdivision plat was a matter of first impression.¹²³ In part I, the *Cougar Mountain* opinion, the court decided that application of the clearly erroneous standard was appropriate for plat denials as well.¹²⁴

In part II of the opinion, the court evaluated the council's action under the procedural requirements governing SEPA denials and found it to be inadequate.¹²⁵ Finally, in part III of the opinion, the court addressed the council's use of the King County Comprehensive Plan to deny Cougar Mountain's proposal. In this last section of the opinion, the court held that the council could not use the comprehensive plan in this fashion because a comprehensive plan is only a general policy guide, which is subordinate to specific zoning regulations.¹²⁶ The problem the court faced in these final two sections of the opinion was the question of what authority the council had relied on in Ordinance 7945 when it denied Cougar Mountain's proposal. Some confusion is understandable because Ordinance 7945 is not a model of clarity.

One plausible reading of Ordinance 7945 is that the council relied purely on its SEPA authority. The decision section of Ordinance 7945 reads in part: "Therefore, pursuant to the authority provided by Chapter 43.21C RCW and King County Code Chapter 20.44 [the statute that identifies King County SEPA policies, including the policies of the comprehensive plan], the proposal is denied with leave to submit a revised application."¹²⁷ Both parties seemed to understand the case in

121. *E.g.*, *Norway Hill Preservation and Protection Ass'n v. King County*, 87 Wash. 2d 267, 274-75, 552 P.2d 674, 678-79 (1976).

122. *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 68-69, 578 P.2d 1309, 1314-15 (1978).

123. *See Cougar Mountain* at 747-750, 765 P.2d at 267-69.

124. *Cougar Mountain* at 750, 765 P.2d at 269; *see infra* notes 165-178 and accompanying text for a discussion of the standards of judicial review for substantive SEPA denial in general and a discussion of the clearly erroneous standard in particular.

125. *Cougar Mountain*, 111 Wash. 2d at 750-55, 765 P.2d at 269-71; *see* WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660.

126. *Cougar Mountain*, 111 Wash. 2d at 755-57, 765 P.2d at 271-72.

127. *King County, Wash.*, Ordinance 7945 at 9.

this way because they briefed the case purely as a SEPA denial case.¹²⁸

It is also plausible, however, to interpret Ordinance 7945 as denying Cougar Mountain's application on the basis of both SEPA authority and conflict with the King County Comprehensive Plan. The decision section of Ordinance 7945 states that "[t]he proposal also conflicts with numerous policies of the King County Comprehensive Plan-1985."¹²⁹ Further, at conclusion 3, the county stated that "[t]he proposal as presently envisioned also conflicts with numerous policies of the King County Comprehensive Plan-1985."¹³⁰

The organization of Ordinance 7945 only adds to the ambiguity. Findings 1 through 9 of the ordinance discuss the adverse impacts of the Cougar Mountain proposal, but the specific policies or statutes offended by each impact are not included point by point.¹³¹ Thus, the *Cougar Mountain* court could have interpreted Ordinance 7945 in either way.

The court majority seems to have adopted the second view. The court appears to have interpreted the King County Council's Ordinance 7945 as denying Cougar Mountain's plat application upon both the council's substantive SEPA authority and the application's inconsistency with the King County Comprehensive Plan. In its opening discussion of the case, the court stated that "[t]he new ordinance reflected the council's determination that Cougar Mountain's proposal should be denied because the subdivision would result in significant adverse environmental impacts that could not reasonably be mitigated. The council *also* concluded that the proposal conflicted with several policies of the 1985 King County Comprehensive Plan."¹³² Later in its opinion, the court reiterated that "[i]n this case, the King County Council apparently based its denial of Cougar Mountain's application on conflicts with SEPA *and* the 1985 King County Comprehensive Plan."¹³³ When the

128. See Briefs of the Parties, *Cougar Mountain*, 111 Wash. 2d 742, 765 P.2d 264 (1988).

129. King County, Wash., Ordinance 7945 at 9.

130. *Id.*; No mention is made in Ordinance 7945 of the Agricultural Preservation Program or the King County Zoning Code provisions upon which the subdivision examiner relied in addition to the King County Comprehensive Plan and the policies of SEPA.

131. See King County, Wash., Ordinance 7945 at 2-8; cf. Bellevue Resolution 4619 (the findings and conclusions of the Bellevue City Council in *West Main II*).

132. *Cougar Mountain*, 111 Wash. 2d at 746, 765 P.2d at 266 (emphasis added).

133. *Id.* at 752, 765 P.2d at 270 (emphasis added).

majority opinion is viewed in this light, the organization of the opinion makes sense. Part II of the opinion discusses the council's denial of the proposal under its substantive SEPA authority and finds the denial inadequate because of procedural shortcomings. Part III of the opinion discusses the council's separate denial of the proposal as conflicting with the comprehensive plan.

The thrust of part II of the opinion is that Ordinance 7945 did not fulfill the procedural protections guaranteed by SEPA.¹³⁴ First, SEPA requires the council to find that the plat would result in significant adverse environmental impacts as disclosed by the EIS.¹³⁵ The council discussed the adverse environmental impacts of the proposal in findings 1 through 9 of Ordinance 7945. Although the council's discussion was rather general and never cited to the specific portions of the EIS, the court seemed to indicate that the significant adverse impacts of the proposal were set forth in sufficient detail.¹³⁶ However, SEPA also requires that a denial be based on formally adopted policies designated as possible bases for the exercise of SEPA authority and that the agency cite the SEPA policy that is the basis for any denial.¹³⁷ Here the court found that the council had "failed to describe the specific SEPA policies with which Cougar Mountain's application conflicted."¹³⁸ After detailing the significant adverse impacts, Ordinance 7945 makes only a blanket reference to the statute containing the King County SEPA policies¹³⁹ and then concludes in summary fashion.¹⁴⁰ The *Cougar Mountain* court found that these conclusions failed to satisfy SEPA: "The Council merely stated in a conclusory fashion that the proposal would result in significant environmental impacts and that these impacts could not

134. *Id.* at 750-55, 765 P.2d at 269-71.

135. See WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660.

136. See *Cougar Mountain*, 111 Wash. 2d at 753-755, 765 P.2d at 270-271; King County, Wash., Ordinance 7945 at 2-8; *Compare* *Nagatani Brothers, Inc. v. Skagit County Bd. of Comm'rs*, 108 Wash. 2d 477, 739 P.2d 696 (1987) (where the record was clearly inadequate because the findings of significant adverse impacts were practically non-existent and the final EIS was little more than a list of agencies to whom the draft EIS had been sent) *with West Main II*, 49 Wash. App. 513, 742 P.2d 1266 (in Bellevue Resolution 4619 every finding of adverse impact is detailed and cited to specific pages of the EIS).

137. WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660(1).

138. *Cougar Mountain*, 111 Wash. 2d at 753, 765 P.2d at 270.

139. KING COUNTY, WASH., CODE § 20.44.080 (1989).

140. King County, Wash., Ordinance 7945 at 8-9.

reasonably be mitigated."¹⁴¹

The court placed special stress on the third requirement for SEPA denials, which provides that the agency must find that reasonable mitigation measures are insufficient to mitigate the identified impacts.¹⁴² The council failed to specifically discuss reasonable mitigation measures to counteract the impacts and failed to state specifically why such measures would be inadequate.¹⁴³ Ordinance 7945 briefly mentions some of the proposed mitigations from the EIS, such as a native growth protection easement along the wetlands and creek,¹⁴⁴ however, the court felt strongly that this was not enough for a SEPA denial:

If proposals are rejected on the basis of SEPA concerns, the agency must spell out its objections and how they can be satisfied or, if not, why not. Thus, before denying a proposal on SEPA grounds, we hold that an agency must (1) specifically set forth potential adverse environmental impacts that would result from implementation of the proposal, and (2) specifically set forth reasonable mitigation measures to counteract these impacts, or, if such measures do not exist, (3) specifically state why the impacts are unavoidable and development should not be allowed. The King County Council did not follow this procedure.¹⁴⁵

The court based its holding in part II squarely on King County's non-compliance with the procedural protections of SEPA listed above. The court did not invalidate any of King County's local SEPA policies, which included the King County Comprehensive Plan. The findings and conclusions of King County in Ordinance 7945 simply did not meet SEPA's strict requirements of specificity.¹⁴⁶ In part III of the opinion, the court proceeds to discuss the council's error in relying on its

141. *Cougar Mountain*, 111 Wash. 2d at 753, 765 P.2d at 270.

142. WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660(1)(f).

143. *Cougar Mountain*, 111 Wash. 2d at 755, 765 P.2d at 271.

144. King County, Wash., Ordinance 7945 at 8 (in conclusion 2).

145. *Cougar Mountain*, 111 Wash. 2d at 755, 765 P.2d at 271.

146. See Resolution 4619 (the findings and conclusions from *West Main II*). This resolution is a good example of findings that probably would meet this test. Resolution 4619 proceeds methodically through the significant adverse impacts identified in the EIS, citing to specific page numbers of the EIS, and citing and quoting the specific local agency SEPA policies offended by each adverse impact. Possible mitigation measures are set out in more detailed discussions with references to the EIS; see also Bellevue, Wash., Resolution 5115 (March 20, 1989) (the findings in the substantive SEPA denial case of *Safeway Stores v. Bellevue*, No. 89-2 05765-4 (August 8, 1989).

comprehensive plan to deny Cougar Mountain's application.¹⁴⁷

In part III of its opinion, the court followed a long line of non-SEPA zoning cases by holding that a comprehensive plan is only a general policy guide and may not be used to override a valid zoning regulation.¹⁴⁸ The council thus "erred in relying on the provisions of the King County Comprehensive Plan to deny Cougar Mountain's application."¹⁴⁹ This section of the opinion should be understood to stand for the sole proposition that a comprehensive plan may not be used *on its own* to override zoning. From the opening sentence, the language of this part of the opinion strongly suggests that the court considered the comprehensive plan an issue separate from substantive SEPA authority.¹⁵⁰ Significantly, part III of the *Cougar Mountain* opinion contains no reference to SEPA or to the use of a comprehensive plan *as a SEPA policy*.¹⁵¹

147. *Cougar Mountain*, 111 Wash. 2d at 755-57, 765 P.2d at 271-72.

148. *See supra* note 96.

149. *Cougar Mountain*, 111 Wash. 2d at 757, 765 P.2d at 272.

150. *See id.* at 755, 765 P.2d at 270 ("Cougar Mountain *also* asserts that the council erred when it used the King County, Wash., Comprehensive Plan as a means for denying Cougar Mountain's subdivision application." (emphasis added)).

151. The *Cougar Mountain* court created unneeded confusion by citing to *Nagatani Bros. v. Skagit County Bd. of Comm'rs*, 108 Wash. 2d 477, 739 P.2d 696 (1987), for the proposition that a conflict between a zoning ordinance and a comprehensive plan must be resolved by application of the zoning ordinance, because *Nagatani* was also a substantive SEPA case, among other things. (The court also cited two non-SEPA zoning decisions for the proposition; *Norco Construction v. King County*, 97 Wash. 2d 680, 649 P.2d 103 (1982), and *Carlson v. Beaux Arts Village*, 41 Wash. App. 402, 704 P.2d 663 (1985)).

In *Nagatani*, Skagit County denied a preliminary plat application because of adverse traffic impacts, loss of agricultural land, conflicts between residential and agricultural uses, and non-compliance with the comprehensive plan. The findings and conclusions of the County were practically nonexistent, and it was impossible for the court to tell what authority the County had relied on to deny the application. The County attempted to justify its denial, in part, upon SEPA. (This SEPA defense of the County action was evidently not even raised in the court below. *See Nagatani Bros. v. Skagit County*, 46 Wash. App. 106, 728 P.2d 1104 (1986)). An EIS was prepared in the case, but the DEIS disclosed no unmitigable impacts and the final FEIS was merely a list of the agencies to whom the DEIS had been circulated, none of whom had raised any concerns. None of SEPA's procedural requirements for denial were complied with.

The *Nagatani* court did not say that a comprehensive plan cannot be used as a SEPA policy, and the confusing opinion, based on an insufficient and confusing administrative record, does not stand for that proposition.

The interesting aspect of the *Nagatani* opinion for appellants is that the remedy granted by the Washington Supreme Court was remanded to the county commissioners with an order to approve the plat. This is the only published substantive SEPA case which grants such a remedy. All other cases have either upheld the agency action or remanded to the agency for reconsideration.

The dissent in *Cougar Mountain* interpreted the majority opinion differently.¹⁵² The dissent took the majority to task for holding "that the zoning code repeals and/or supersedes SEPA if the comprehensive plan is not in accordance with the zoning code."¹⁵³ The dissent clearly felt that the majority opinion incorrectly overturned the court of appeals' holding in *West Main II*, which explicitly recognized an agency's right to rely upon language from comprehensive plans when denying proposals. The *Cougar Mountain* dissent stated that "[s]ince the Council adopted the comprehensive plan as a local SEPA policy, it was entitled to rely on the comprehensive plan in denying the proposal under SEPA."¹⁵⁴ The better interpretation of the *Cougar Mountain* majority, however, is that the opinion is consistent with *West Main II*.

VI. COUGAR MOUNTAIN AND WEST MAIN II ARE CONSISTENT

The actual language and organizational scheme of the *Cougar Mountain* majority opinion clearly indicate that the majority thought that King County denied Cougar Mountain's proposal on two bases: substantive SEPA and inconsistency with the King County Comprehensive Plan.¹⁵⁵ The ambiguity of Ordinance 7945 lends support to this interpretation.¹⁵⁶ The *Cougar Mountain* decision makes explicit what was implicit in *West Main II*. After *Cougar Mountain*, it is clear that agencies must rigidly adhere to the procedural requirements of substantive SEPA authority. Written findings in future substantive SEPA denial cases will be especially important because courts will closely examine them for this procedural compliance. The adverse environmental impacts identified in the EIS must be discussed with some specificity. Agencies must specify for each impact the formal agency SEPA policy offended. Perhaps most important, reasonable mitigation measures must be thoroughly considered before an agency may deny a proposal upon concluding that the identified adverse impacts cannot be mitigated. This is consistent with *West Main II* because the writ-

152. *Cougar Mountain*, 111 Wash. 2d at 758-63, 765 P.2d at 273-75 (Dore and Pearson, JJ., dissenting) (The dissent would have upheld the council's actions as satisfying SEPA's procedural protections).

153. *Id.* at 761, 765 P.2d at 274 (Dore and Pearson, JJ., dissenting).

154. *Id.* at 763, 765 P.2d at 275 (citing *West Main II*, 49 Wash. App. 513, 742 P.2d 1266) (Dore and Pearson, JJ., dissenting).

155. See *supra* notes 133-40 and accompanying text.

156. See *supra* notes 136-38 and accompanying text.

ten findings involved in *West Main II* were a model of such procedural compliance.

Neither decision puts any substantive restrictions on the content of local agency SEPA policies. The *Cougar Mountain* court merely held that a comprehensive plan, on its own, has no regulatory effect. Thus, the *Cougar Mountain* decision does not overturn the holding in *West Main II* that comprehensive plans, land use codes, or the broad general policies of the SEPA statute may be adopted and used by agencies to guide their discretion in the exercise of their substantive SEPA authority.

In addition, the peculiar procedural nexus between the two cases indicates that the supreme court regarded *West Main II* as consistent with *Cougar Mountain*. *West Main*'s petition for review to the supreme court was deferred for a year pending the decision in *Cougar Mountain*, and after that decision, the petition was denied.¹⁵⁷ Ordinarily, denial of a petition for review does not imply approval, but here denial seems to be based on the court's finding that *West Main II* was consistent with *Cougar Mountain*. Moreover, Justice Callow, who was on the three-judge panel that decided *West Main II*, wrote the majority opinion for the supreme court in *Cougar Mountain*.¹⁵⁸ This peculiar appellate history is another indication that the cases are consistent and that they provide a good assessment of the current limits of substantive SEPA authority.

VII. CURRENT LIMITATIONS ON SUBSTANTIVE SEPA

A. *The Clearly Erroneous Standard of Judicial Review*

Since 1983 SEPA has explicitly granted an aggrieved person the right to judicial review of agency compliance with SEPA's requirements.¹⁵⁹ Prior to 1983, the courts inferred a right to judicial review.¹⁶⁰ The SEPA statute and rules are silent, however, as to the proper standard for this judicial review.

157. See *supra* note 104.

158. See *Cougar Mountain*, 111 Wash. 2d at 743, 765 P.2d at 265; *West Main Assocs. v. City of Bellevue*, 49 Wash. App. 513, 515 (1987) (in footnote), *review denied*, 112 Wash. 2d 1009 (1988).

159. See WASH. REV. CODE § 43.21C.075; WASH. ADMIN. CODE § 197-11-680(8).

160. See *Leschi Improvement Council v. Wash. State Highway Comm'n*, 84 Wash. 2d 271, 525 P.2d 774 (1974); *Coughlin v. Seattle School Dist. No. 1*, 27 Wash. App. 888, 621 P.2d 183 (1980).

Consequently, Washington courts have settled on the moderately broad scrutiny of the clearly erroneous standard of review¹⁶¹ for considering SEPA denials¹⁶² rather than the more common and more deferential arbitrary and capricious standard of review for administrative action.¹⁶³ The clearly erroneous standard requires the court to review the entire record and examine all the evidence in light of the public policy contained in the legislation authorizing the agency action.¹⁶⁴ The court will not overturn the agency's judgment unless it is "left with the definite and firm conviction that a mistake has been committed."¹⁶⁵ This standard calls for "a higher degree of judicial scrutiny than is normally appropriate for administrative action."¹⁶⁶

In *Norway Hill Preservation and Protection Association v. King County*,¹⁶⁷ the Washington Supreme Court recognized that this broader degree of scrutiny was appropriate when reviewing negative threshold determinations (DNS) under SEPA. The court reasoned that the policies of SEPA were of particular importance to the legislature and that the broader scrutiny of the clearly erroneous standard was an appropriate check on possible short-cuts of the SEPA decision-making process.¹⁶⁸ In the later case of *Polygon Corp. v. City of Seattle*,¹⁶⁹ the Washington Supreme Court held that this broader review was equally appropriate when reviewing an agency's SEPA denial of a building permit because environmental factors are not readily quantifiable and because agency decisions are often

161. See WASH. REV. CODE § 34.04.130(e) (1989).

162. *E.g., Cougar Mountain*, 111 Wash. 2d at 747-49, 765 P.2d at 267-68; *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 52, 69-70, 578 P.2d 1309, 1315 (1978).

163. See WASH. REV. CODE § 34.04.130(e); *Barrie v. Kitsap County*, 93 Wash. 2d 843, 613 P.2d 1148 (1980). Arbitrary and capricious conduct is "willful and unreasonable action, without consideration and [in] disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached." *Barrie*, 93 Wash. 2d at 850, 613 P.2d at 1152 (quoting *Buell v. City of Bremerton*, 80 Wash. 2d 518, 526, 495 P.2d 1358, 1363 (1972)).

164. *Ancheta v. Daly*, 77 Wash. 2d 255, 259, 461 P.2d 531, 534 (1969).

165. *Polygon*, 90 Wash. 2d at 69, 578 P.2d at 1315; *Ancheta*, 77 Wash. 2d at 259-60, 461 P.2d at 534.

166. *Polygon*, 90 Wash. 2d at 69, 578 P.2d at 1315; see *State ex rel Randall v. Snohomish County*, 79 Wash. 2d 619, 625, 488 P.2d 511, 514-15 (1971).

167. 87 Wash. 2d 267, 274-75, 552 P.2d 674, 678-79 (1976).

168. *Id.*; see generally Comment, *The Scope of Judicial Review of Agency Actions in Washington State - Doctrine, Analysis, and Proposed Revisions*, 60 WASH. L. REV. 653, 662 (1985).

169. 90 Wash. 2d 59, 578 P.2d 1309 (1978).

made in an atmosphere of intense political pressure, which is conducive to abuse of discretion.¹⁷⁰ The court in *Cougar Mountain* explicitly extended this reasoning to the substantive SEPA denial of a subdivision plat.¹⁷¹

Washington courts recognize that SEPA serves legitimate functions, but are concerned that SEPA authority will be used by overreaching local governments to block projects merely because the projects are unpopular.¹⁷² Use of the broader review of the clearly erroneous standard helps courts to ensure that SEPA denials are a responsible exercise of power and that the agency made its decision after weighing the arguments and alternatives evenhandedly.

B. Procedural Limitations

The importance of stringent procedural limitations on the exercise of substantive SEPA authority has been clear at least since *Polygon Corp. v. Seattle*.¹⁷³ The Washington Supreme Court recognized in *Polygon* that procedural safeguards are particularly important to protect property owners from arbitrary and abusive regulatory action.¹⁷⁴ SEPA often has been described as essentially a procedural statute designed to ensure that environmental impacts and alternatives are properly and fairly considered by the agency decision-maker, without dictating results and without usurping local decision-making.¹⁷⁵

The lesson of *Cougar Mountain* is that courts will look very closely for procedural compliance with the substantive SEPA provisions.¹⁷⁶ Written agency findings and conclusions are particularly important because they document agency compliance with this procedural mandate.¹⁷⁷ The significant

170. *Id.* at 68-69, 578 P.2d at 1314-15; see generally Note, *A Standard for Judicial Review of Administrative Decisionmaking Under SEPA - Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978), 54 WASH. L. REV. 693 (1979).

171. *Cougar Mountain Assocs. v. King County*, 111 Wash. 2d 742, 747-50, 765 P.2d 264, 267-69 (1988).

172. See *Parkridge v. City of Seattle*, 89 Wash. 2d 454, 466, 572 P.2d 359, 366 (1978); *Kenart & Assocs. v. Skagit County*, 37 Wash. App. 295, 303, 680 P.2d 439, 444 (1984).

173. See *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 52, 66-67, 578 P.2d 1309, 1313-14.

174. *Id.* at 69, 578 P.2d at 1315.

175. *E.g.*, *Save Our Rural Env't (SORE) v. Snohomish County*, 99 Wash. 2d 363, 371, 662 P.2d 816, 820 (1983).

176. See *Cougar Mountain Assocs. v. King County*, 111 Wash. 2d 742, 765 P.2d 265 (1988); WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660.

177. See *Kenart & Assocs. v. Skagit County*, 37 Wash. App. 295, 680 P.2d 439 (1984). Two examples of written findings which meet this procedural requirement of

adverse environmental impacts as identified¹⁷⁸ in the EIS must be set out specifically.¹⁷⁹ The local agency SEPA policies that conflict with each impact and form the basis for denial must also be set out specifically.¹⁸⁰ Further, the written findings must contain an explicit discussion of reasonable mitigation measures and the reasons why they are inadequate.¹⁸¹

Adequate findings not only enable the developer to satisfy the agency's objection and file another application, but they also make appellate review possible.¹⁸² A similar motive underlies the judicial requirement of adequate findings as the judicial adoption of the clearly erroneous standard of review. When an agency provides adequate findings and conclusions, the court can more easily determine whether the substantive SEPA denial was a responsible exercise of power. Local government may not use SEPA as a pretext to deny a politically, or otherwise unpopular, project but must make their decisions based on the environmental impacts and alternatives presented in the EIS.¹⁸³ This sounds like good news indeed for landowners who desire to develop their property. However, this procedural good news for developers must be tempered with the lessons of *Cougar Mountain* and *West Main II*: there are only the slimmest of substantive restraints on local agencies exercising substantive SEPA authority.

C. *Substantive Limitations—Content of Local Agency SEPA Policies*

Plaintiffs in SEPA denial cases have attacked the content

specificity are the findings in *West Main II*, Resolution No. 4619 (September 11, 1985), and the written findings in the recent substantive SEPA denial case of Safeway Stores v. City of Bellevue, No. 89-2 05767-4 (King County Super. Ct. August 8, 1989), Bellevue, Wash., Resolution 5115 (March 20, 1989). It is useful to compare these two documents with the written findings that the court found insufficient in *Cougar Mountain*, King County, Wash., Ordinance No. 7945 (February 2, 1987).

178. The impacts need not be labelled as "significant" in the EIS. See *supra* notes 84-86 and accompanying text.

179. *Cougar Mountain*, 111 Wash. 2d at 755, 765 P.2d at 271; *Levine v. Jefferson County*, 54 Wash. App. 88, 92, 772 P.2d 528, 530 (1989), *opinion withdrawn* (January 24, 1990), *aff'd*, 57 Wash. App. 1002 (1990); WASH. REV. CODE § 43.21C.060(1); WASH. ADMIN. CODE § 197-11-660(b).

180. *Cougar Mountain*, 111 Wash. 2d at 753, 765 P.2d at 270; WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE § 197-11-660(b).

181. *Cougar Mountain*, 111 Wash. 2d at 755, 765 P.2d at 271; WASH. REV. CODE § 43.21C.060(2); WASH. ADMIN. CODE § 197-11-660(b).

182. *Kenart Assocs. v. Skagit County*, 37 Wash. App. 295, 680 P.2d 439 (1984).

183. *Id.* at 303, 680 P.2d at 444.

of local agency SEPA policies, seeking to invalidate some types of policies upon which the agency has relied for its decision.¹⁸⁴ Landowners have challenged policies as being so vague and discretionary that they are unable to plan their conduct with reasonable certainty.¹⁸⁵ It has also been argued that many municipalities have adopted SEPA policies that contradict each other, and thus, landowners are unable to plan development with reasonable certainty.¹⁸⁶ Thus far, Washington courts have shown almost no inclination to limit agency discretion on the content of adopted policies.¹⁸⁷

The legislature has given broad discretion to local government in the adoption of local SEPA policies.¹⁸⁸ The SEPA statute and rules do not specifically identify the types of policies that may be adopted and require only that the identified policies be interpreted and administered in accordance with the general policies of SEPA.¹⁸⁹ The legislature intended that the SEPA statute and rules enable local governments to adopt broad, flexible policies so that local governments would have flexibility to respond to the environmental criteria disclosed by the EIS.¹⁹⁰ Local governments would lose all flexibility to respond to changing environmental information if required to establish strict, predictable policies. This is especially true in Washington because of the liberal vesting rules of the state's vested rights doctrine. Thus, the requirement of designated policies appears to be a loose notice requirement rather than a strict rule-making requirement.¹⁹¹

Washington courts have been untroubled by agency reliance on general policy statements.¹⁹² This is a predictable result because Washington courts have accepted discretionary zoning and the trend to more flexible, tailored land use regula-

184. See *West Main Assocs. v. City of Bellevue*, 49 Wash. App. 513, 523-24, 742 P.2d 1266, 1272 (1987), *review denied*, 112 Wash. 2d 1009 (1988).

185. *Id.*

186. See Hill, *Vested Rights in the Post-Modern World*, FOURTH ENVIRONMENTAL AND LAND USE LAW MID-YEAR, WASH. STATE BAR ASSOC. 7B-8 (1986).

187. *But see Prisk v. City of Poulsbo*, 46 Wash. App. 793, 732 P.2d 1013 (1987) (see *infra* notes 207-13 and accompanying text).

188. See WASH. REV. CODE § 43.21C.060; WASH. ADMIN. CODE §§ 197-11-660 and 902.

189. See WASH. REV. CODE §§ 43.21C.020 and .030(1).

190. TEN YEARS' EXPERIENCE WITH SEPA: FINAL REPORT OF THE COMMITTEE ON ENVIRONMENTAL POLICY at 39 (1983).

191. See Rodgers, *The Washington Environmental Policy Act*, 60 WASH. L. REV. 36, 61 (1984).

192. *E.g.*, *Polygon Corp. v. Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

tions.¹⁹³ Broad standards are deemed sufficient if procedural safeguards are met.¹⁹⁴ This trend continues in *Cougar Mountain* and *West Main II*, and the decision in *Cougar Mountain* demonstrates that Washington courts will stringently enforce these procedural safeguards.

The issue of whether a comprehensive plan may be adopted and used as a SEPA policy was not conclusively put to rest by the rather ambiguous language of the court in *Cougar Mountain* and will likely continue to be argued by advocates.¹⁹⁵ The better analysis is that current law allows a comprehensive plan to be validly adopted and used as a SEPA policy. The *West Main II* and *Cougar Mountain* decisions are consistent on this point; the *Cougar Mountain* court merely held that zoning may not be overridden by a comprehensive plan on its own authority.¹⁹⁶ The argument to the contrary seems frivolous because a local government agency could easily circumvent such a prohibition. The agency could merely write and adopt, independently of the comprehensive plan, a SEPA policy that is identical or virtually identical to that comprehensive plan.

The only substantive SEPA case to date in which a court may have invalidated the content of a local agency SEPA policy is *Prisk v. Poulsbo*.¹⁹⁷ In *Prisk*, the City of Poulsbo exercised its substantive SEPA authority to condition a condominium project proposal. The City had adopted an ordinance authorizing imposition of park fees on developers in lieu of land dedication. The Washington Supreme Court had previously held that such development fee statutes were invalid *ultra vires* taxation.¹⁹⁸ The City of Poulsbo argued that they could still impose the development fees under their substantive SEPA authority and pointed to the invalid ordinance "as

193. See *Save Our Rural Env't (SORE) v. Snohomish County*, 99 Wash. 2d 363, 369, 662 P.2d 816, 819 (1983).

194. See, e.g., *Polygon*, 90 Wash. 2d 59, 578 P.2d 1309.

195. See Petitioner's Opening Brief at 9, *Safeway Stores v. Bellevue*, No. 89-2 05765-4 (King County Super. Ct. August 8, 1989) Superior Court of King County, Wash. In *Safeway Stores*, Bellevue successfully used its substantive SEPA authority to deny a building permit for a Safeway superstore. Safeway did not appeal the superior court judgment but the owner of the property upon which Safeway intended to build was a party to the suit and did appeal. However, before the case came before the court of appeals the appellant decided to pursue other development opportunities and voluntarily dismissed the appeal.

196. See *supra* notes 151-159 and accompanying text.

197. 46 Wash. App. 793, 732 P.2d 1013 (1987).

198. *Hillis Homes, Inc. v. Snohomish County*, 97 Wash. 2d 804, 650 P.2d 193 (1982).

evidence of an existing environmental policy regarding increased population density and the resulting need for parks."¹⁹⁹

The *Prisk* court assumed without deciding that a local government could bypass the *Hillis Homes* prohibition against such fees by a valid exercise of substantive SEPA authority.²⁰⁰ The opinion is opaque, however, concerning the exact SEPA or constitutional reason for striking down the city's action. It is possible that the City had merely failed to validly adopt a local SEPA policy concerning the environmental need for parks.²⁰¹ However, the court also demanded a "reasonable relationship between the conditions or fees imposed and the environmental objective."²⁰² Thus, the opinion may stand for the proposition that a flat fee of \$200 per dwelling unit, applicable to all dwelling units irregardless of the specifics of the individual proposal, is not reasonably related to the "specific adverse environmental impacts which are identified in the environmental documents prepared. . . ."²⁰³ This could be read to impose a substantive limitation similar to the rational relation requirement of substantive due process on either the content of SEPA policies or the content of mitigating measures.

D. Substantive Limitations—Substantive Due Process

The underlying basis for substantive SEPA is, of course, the police power. Therefore, the doctrinal limits on the police power are also limits on the exercise of substantive SEPA. In *West Main I*, the Washington Supreme Court applied the substantive due process formulation to all land use ordinances.²⁰⁴ These due process limitations apply to local agency SEPA ordinances, as well as to other land use ordinances.²⁰⁵

Washington courts have generally viewed SEPA as primarily a procedural statute and have declined to decide cases on a substantive due process basis. However, several recent non-SEPA land use cases have applied substantive due process

199. *Prisk*, 46 Wash. App. at 801, 732 P.2d at 1019.

200. *Id.* at 802, 732 P.2d at 1019.

201. "The need for parks is not an environmental concern simply because the city engineer calls it one, absent a stated policy to that effect." *Id.*

202. *Id.*

203. WASH. REV. CODE § 43.21C.060.

204. *West Main Assocs. v. City of Bellevue*, 106 Wash. 2d 47, 52, 720 P.2d 782, 785-86 (1986) (*West Main I*).

205. *See Victoria Tower Partnership v. City of Seattle*, 49 Wash. App. 755, 761, 745 P.2d 1328, 1331 (1987).

to vested rights and zoning situations.²⁰⁶ Due process requires that governments treat citizens in a fundamentally fair manner.²⁰⁷ This promotes the goal of the vested rights doctrine to protect citizens from the fluctuating policies of the government so that they can exercise their "constitutional right to develop property" with reasonable certainty.²⁰⁸ The land use ordinance must aim at a legitimate public purpose and the means used to achieve that purpose must be reasonably necessary and not unduly oppressive to individuals.²⁰⁹ To the extent that SEPA policies are viewed as land use ordinances,²¹⁰ this same analysis could apply to the content of local agency SEPA policies.

In recent substantive SEPA decisions, however, there is little evidence of any increased willingness of courts to listen to substantive due process arguments. Substantive due process analysis has not yet been applied in any substantive SEPA case.

VIII. SUGGESTED LIMITATIONS ON SUBSTANTIVE SEPA

The central tension in the substantive SEPA cases is between the policies of the vested rights doctrine to protect landowners and the need for local governments to retain flexibility in environmental decision-making.

The property developer operating under SEPA wants to be able to plan development with reasonable certainty and to be able to make profitable use of his or her property. Fundamental fairness requires that the property owner be protected from the hazard of abusive and arbitrary government regulation and the fluctuating policies of the legislature.²¹¹ Local governments have a duty to provide land owners and developers with reasonable certainty so that they can plan the use of their property.²¹²

On the other hand, local governments need the authority

206. See *Valley View Industrial v. City of Redmond*, 107 Wash. 2d 621, 733 P.2d 182 (1987); *West Main I*, 106 Wash. 2d 47, 720 P.2d 782; *Norco Constr. v. King County*, 97 Wash. 2d 680, 649 P.2d 103 (1982).

207. *Valley View*, 107 Wash. 2d at 636, 733 P.2d at 191; *West Main I*, 106 Wash. 2d at 51, 720 P.2d at 785.

208. *West Main I*, 106 Wash. 2d at 51, 720 P.2d at 785.

209. *Valley View*, 107 Wash. 2d at 636, 733 P.2d at 191; *West Main I*, 106 Wash. 2d at 51, 720 P.2d at 785; *Norco*, 97 Wash. 2d at 685, 649 P.2d at 106.

210. See *Victoria Tower*, 49 Wash. App. at 761, 745 P.2d at 1331.

211. *West Main I*, 106 Wash. 2d at 51, 720 P.2d at 785; *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 69, 578 P.2d 1309, 1315 (1978).

212. E.g., *West Main I*, 106 Wash. 2d at 51, 720 P.2d at 785.

to respond to site-specific proposals and to tailor their approvals to changing environmental conditions and values. This is supported by the legislative policy embodied in SEPA that requires full consideration of environmental values.²¹³ Local governments value predictability, but also desire flexibility in substantive SEPA decisions because of the permissive vested rights doctrine of Washington.

Substantive SEPA acts as a safety valve for this vested rights doctrine—to protect the environment from our lack of foresight. Local regulators would have to be omniscient in order to provide developers with absolute certainty. It follows, therefore, that a change in doctrine should be adopted if it can provide more certainty and protection for developers and still retain sufficient flexibility for local governments to respond to the unforeseen environmental effects of specific proposals.

A. Vest Rights in SEPA Policies at Earlier Date

Vesting developers' rights in local agency SEPA policies at the date of permit application would provide more certainty for developers without diminishing the flexibility needed by local governments. Under current SEPA Rules, policies must be in place at the time of DNS or DEIS issuance.²¹⁴ This rule is offensive to the goals of the vested rights doctrine, because it allows local governments to change their environmental decision-making criteria after permit application.²¹⁵ There may be a gap of several years between permit or plat application and the DNS or DEIS issuance.²¹⁶ Vesting of rights in SEPA policies at the date of permit or plat application would provide more predictability to developers and more protection from arbitrary regulation. The flexibility of local governments would still be protected by broad, general SEPA policies that can be used to deny or condition proposals.

213. See WASH. REV. CODE §§ 43.21C.020 and .030; *Stempel v. Dept. of Water Resources*, 82 Wash. 2d 109, 117, 508 P.2d 166, 171 (1973).

214. WASH. ADMIN. CODE § 197-11-660; see *Victoria Tower Partnership v. City of Seattle*, 49 Wash. App. 755, 745 P.2d 1320 (1987).

215. See *supra* notes 69-73 and accompanying text.

216. See, e.g., *Cougar Mountain Assocs. v. King County*, 111 Wash. 2d 742, 743-45, 765 P.2d 264, 265-66 (1988) (The length of time between plat application and DEIS issuance in *Cougar Mountain* was 3 years and 2 months.)

B. *Incorporate Environmental Concerns Into Regulatory Codes*

A second suggestion is to encourage local governments to incorporate environmental concerns into regulatory land use codes to the extent feasible. There is already a significant trend in this direction.²¹⁷ Neither local governments nor developers like time-consuming negotiation and expensive litigation. Therefore, this is a promising solution for those environmental impacts that are reasonably predictable, such as increased traffic and its attendant pollution. In such predictable impact areas, developers gain more certainty, and local governments give up no flexibility. Again, local government flexibility is still protected from unforeseen impacts by the existence of broad, general local agency SEPA policies.

C. *Restrict Content of Local Agency SEPA Policies*

A more ambitious suggestion is to judicially or legislatively limit the allowable content of local agency SEPA policies. Comprehensive land use regulations that categorically regulate all properties of a certain kind or in a certain area should not be allowed as SEPA policies. Local agencies should only be allowed to adopt SEPA policies that are environmental standards related to an ad hoc determination of a specific proposal's environmental impacts. SEPA policies must be performance standards rather than inflexible rules. These standards need not be precisely quantifiable, but they must establish standards by which the specific environmental impacts of a proposal can be measured.

Many local governments have taken the "kitchen sink" approach to the adoption of SEPA policies. They have adopted by reference the whole of their zoning codes, comprehensive plans, shoreline management master plans, and so forth as local agency SEPA policies.²¹⁸ This seems to be largely a matter of convenience. It is impossible to believe that every section of a land use code or comprehensive plan thus adopted is

217. See McLerran, *Substantive SEPA: What is the Practice and What are the Limits*, ENVIRONMENTAL AND LAND USE LAW MID-YEAR, Wash. State Bar Assoc. at 4A-5 (1987).

218. *E.g.*, KING COUNTY, WASH., CODE § 20.44.080. King County has adopted as local agency SEPA policies the whole of the King County Zoning Code, the whole of the King County Comprehensive Plan, the King County Agricultural Lands Policy, the King County Landmarks Preservation Code, the King County Shoreline Management Master Plan, etc.

intended as an environmental policy to guide agency determinations on the significance of the impacts of any specific proposal. Courts should take this into account when interpreting these local agency policy statutes and not allow local government reliance on categorical regulations.

This suggestion is based on the idea that the environmental determinations of SEPA should be uniquely related to the specific environmental impacts of the proposal in question.²¹⁹ For example, a comprehensive plan provision that prescribes one dwelling unit per every five acres, no matter the specific impacts of the proposed dwelling units, should not be a valid SEPA policy.²²⁰ On the other hand, a provision that projects should not be excessive in bulk or scale would be a valid standard that a local decision-maker could use to assess the specific impacts of a particular proposal. Categorical regulations do not respond to the impacts of a particular plan on a particular site.

This suggestion is supported by language in Washington case law that SEPA policies are not a substitute for zoning but provide *general* guidance for determining whether environmental impacts of an otherwise acceptable project require denial.²²¹ Categorical regulations do not give general guidance for a specific decision. Rather, they give specific prescriptions for a class of decisions, and should not be allowed as local agency SEPA policies.

Washington opinions hold that stringent procedural safeguards are necessary because environmental considerations are not amenable to precise quantification.²²² Thus, if an environmental consideration is so precisely foreseeable and quantifiable that it may be expressed in a comprehensive regulation, then it is not needed as a SEPA policy. The purpose of SEPA is to protect from lack of foresight, not to comprehensively regulate.

The rationale of the recent land use cases which invoke substantive due process also supports this suggestion.²²³ A

219. See *Dep't of Natural Resources v. Thurston County*, 92 Wash. 2d 656, 667, 601 P.2d 494, 499 (1979); *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 65-66, 578 P.2d 1309, 1313 (1978).

220. A similar provision of the King County Comprehensive Plan was relied on by the King County Council in *Cougar Mountain*. *Cougar Mountain*, 111 Wash. 2d at 756, 765 P.2d at 272.

221. See, e.g., *West Main Assocs. v. City of Bellevue*, 49 Wash. App. 513, 525, 742 P.2d 1266, 1273 (1987), *review denied*, 112 Wash. 2d 1009 (1989) (West Main II).

222. See, e.g., *Polygon*, 90 Wash. 2d at 69, 578 P.2d at 1315.

223. See *Valley View Industrial Park v. City of Redmond*, 107 Wash. 2d 621, 733

comprehensive regulation is not reasonably related to a particularistic investigation of the specific impacts of a specific project. This lack of a reasonable relation between the SEPA policy and the specific proposal's impacts is one interpretation of the court's rationale in *Prisk v. City of Poulsbo*.²²⁴ That decision can be read to say that a "policy" calling for a flat fee per dwelling unit, applicable to all dwelling units no matter the specific environmental consequences of a particular proposal, is not reasonably related to the specific impacts of a specific proposal.

Implementation of this suggestion, either judicially or legislatively, would not detract from the flexibility of local governments because they would still be able to adopt general performance standards to deal with unforeseen situations. It also would have the virtue of giving greater certainty to landowners because the potential conflicting policies would be reduced.

XV. CONCLUSION

The scope of substantive SEPA authority is currently limited primarily by the clearly erroneous standard of review and by the procedural restrictions set out in the *Cougar Mountain* decision.

The clearly erroneous standard of review does away with the presumption of validity that is usual for agency actions. The court will examine all the evidence in light of the public policies of SEPA. Courts will look carefully at SEPA denials in order to insure that the denial was a responsible exercise of power and that there has been no overreaching by local governments.

The primacy of the procedural safeguards of SEPA as a protection against local government abuse was reaffirmed by *Cougar Mountain*. Courts will inquire closely into the adequacy of required written agency findings and conclusions.

While there is a rigid lack of discretion for local governments in procedural requirements, the *West Main II* decision shows that there is significant discretion in actual substantive decisions. As yet there are no meaningful limitations on the

P.2d 182 (1987); *West Main I*, 106 Wash. 2d 47, 720 P.2d 782 (1986); *Norco Construction v. King County*, 97 Wash. 2d 680, 649 P.2d 103 (1982).

224. 46 Wash. App. 793, 732 P.2d 1013; see *supra* notes 204-10 and accompanying text.

content or specificity of local SEPA policies. Broad standards are sufficient if procedural safeguards are met. Even comprehensive plans may currently be adopted and used as local SEPA policies.

Flexibility of local governments may be maintained and more certainty for land owners could be achieved by vesting developers' rights under local SEPA policies at the time of permit application and by incorporating more environmental concerns into regulatory land use codes. In addition, either the courts or the legislature should limit local governments in the kinds of local SEPA policies that they are allowed to adopt. Comprehensive land use regulations should not be allowed as SEPA policies. Rather, only environmental standards that relate to a specific project's environmental impacts should be allowed.

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