

Is the Growth Management Act Working? A Survey of Resource Lands and Critical Areas Development Regulations

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I. INTRODUCTION

This Article focuses on one of the first of several local government actions required by the Washington State Growth Management Act (GMA):¹ the adoption of development regulations to protect critical areas and conserve resource lands.² The Article is based on a recent report prepared by a team of faculty and graduate students at the University of Washington (University of Washington Study), in cooperation with an advisory committee of experts from inside and outside the university, who collected local development regulations from representative cities and counties throughout Washington State.³ Those local regulations were then compared to one

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1. 1990 Wash. Laws 1972, 1st Ex. Sess., ch. 17 (amended by 1991 Wash. Laws 2903, 1st Sp. Sess., ch. 32, and 1992 Wash. Laws 1050, ch. 227) (codified at WASH. REV. CODE ANN. ch. 36.70A (West 1991 & Supp. 1993), WASH. REV. CODE ANN. ch. 47.80 (West Supp. 1993), and WASH. REV. CODE ANN. ch. 82.02 (West 1991 & Supp. 1993)).

2. WASH. REV. CODE § 36.70A.060 (1992).

3. GARY PIVO ET AL., CRITICAL AREAS AND RESOURCE LANDS DEVELOPMENT REGULATIONS, GROWTH MANAGEMENT PLANNING AND RESEARCH CLEARINGHOUSE, UNIVERSITY OF WASHINGTON, DEPT. OF URBAN DESIGN AND PLANNING, (Aug. 1992). This study, prepared under a grant from The Bullitt Foundation, was published in August 1992 by the University of Washington, College of Architecture and Urban Planning, Growth Management Planning and Research Clearinghouse. The study was written by the Author, Dan Carlson, and Kelly McFall with research assistance from Peter Thorin, Jacob Michaels, and Lona Badgett. Advisory Committee members

another, to guidelines promulgated by Washington state, and to guidelines from other states. The team paid particular attention to jurisdictional compliance with completion deadlines, the type of regulations implemented, consistency among those regulations, the restrictiveness of the regulations, consistency with Washington State guidelines, and consistency with guidelines from other states.⁴

Section II of this Article begins with a summary of Washington's statutory requirements for both local resource land and critical area development regulations. Section II then reviews the circumstances under which those regulations have been adopted. Section III describes the methods used by the research team to collect and evaluate those regulations. Section IV examines whether Washington counties and cities have met their adoption deadlines. Section V describes the general approaches being taken for meeting those requirements. Section VI compares the regulations to one another in order to judge their consistency and relative restrictiveness throughout Washington. Section VII looks at whether the regulations conform with model guidelines prepared by Washington State, and Section VIII reports on how the adopted regulations compare with guidelines found in other states and in the professional literature. Finally, Section IX concludes with a summary of the research team's findings and a discussion of their implications, including my recommendations about what should be done to strengthen Washington's growth management system.

This Article will reveal several problems that suggest needed reforms. First, missed deadlines are exposing resources to risk of degradation. Second, some critical areas and resource

included Professor Earl Bell, Professor Donald Miller, and Associate Professor Frank Westerlund of the University of Washington Department of Urban Design and Planning; Professor Gordon Bradley of the University of Washington College of Forest Resources; Betty Jane Narver of the University of Washington Institute for Public Policy; Bill Scheer of the Washington State University Agricultural Resources Extension Program; Steve Wells of the Washington State Department of Community Development, Growth Management Division; Steve Penland of the Washington State Department of Wildlife; Patrick Pringle of the Washington State Department of Natural Resources, Geology Division; and Susan Enger of the Municipal Services and Research Center. The Advisory Committee's purpose was to provide limited technical assistance; it was not responsible for formulating findings and conclusions but was, instead, primarily responsible for providing comments on the study plan, the guidelines collected from outside Washington State, and the draft report.

4. The jurisdictions who participated in the University of Washington Study were promised confidentiality in exchange for their participation. Consequently, the jurisdictions referred to in this Article are not specifically identified.

lands are not being covered by the required development regulations. Third, some jurisdictions are using the State Environmental Protection Act⁵ (SEPA) process in lieu of development regulations. Fourth, there is excessive inconsistency between the regulations of different jurisdictions. Fifth, some regulations may be too weak or too restrictive. Sixth, there are frequent deviations from state guidelines. And seventh, some elements are not included in local programs that are recommended by other states and the professional literature.

The ultimate conclusion drawn in this Article is that while most local governments are moving together toward the state's growth management goals, many members of the flock are straying, and occasionally the whole flock is taking the wrong turn. The laissez-faire design of the GMA, which allows the state to defer too much to local parochialism, is the major reason. For example, the law gives state government discretion over whether it will comment on draft local plans and regulations⁶ and seek state hearings on inadequate local compliance.⁷ So far, however, state agencies have not chosen to systematically exercise this authority in deference to the "bottom-up" mythology that has been built up around the GMA. The result is a state growth management system that leaves too much power in the hands of the very local governments whose lack of adequate planning made the GMA necessary in the first place. A lack of systematic state review and appeal of local action places excessive responsibility for achieving the GMA's goals on local governments and special interest groups who do not have the capacity to accomplish the task. More even progress toward the state's goals would occur if the state made an effort to offset the political forces that oppose growth management in certain locations. This could be done through increased efforts by the state to comment on draft local plans and development regulations, provide technical assistance, evaluate the adequacy of local plans and regulations, subject inadequate actions to state review, and impose sanctions on those failing to correct inadequacies.

5. WASH. REV. CODE ch. 43.21C (1992).

6. *Id.* § 36.70A.106(1) (1991).

7. *Id.* §§ 36.70A.280, .310.

II. BACKGROUND

The GMA contains thirteen goals⁸ to guide the development and adoption of comprehensive plans and development regulations by counties and cities that either are required or choose to plan under the GMA.⁹ These goals seek a variety of results, including the following: conserving productive forest and agricultural lands and discouraging incompatible uses;¹⁰ encouraging the retention of open space;¹¹ conserving fish and wildlife habitat;¹² and protecting the state's high quality of life, including air and water quality and the availability of water.¹³

To help achieve these goals, the GMA required each city and county to designate, where appropriate, by September 1, 1991, lands that are not already characterized by urban growth and that have long-term significance for the commercial production of agricultural products and timber or the extraction of minerals.¹⁴ The GMA also required each city and county to designate critical areas,¹⁵ which include wetlands, fish and wildlife habitat conservation areas, areas with a critical recharging effect on aquifers used for potable water, frequently flooded areas, and geologically hazardous areas.¹⁶ It further required, by September 1, 1991, each county that is required or chooses to plan under the GMA, and each city within such a county, to adopt development regulations that both ensure conservation of designated agricultural, forest, and mineral resource lands and protect designated critical areas.¹⁷ All remaining counties and cities were only required to adopt development regulations that protect critical areas by March 1, 1992.¹⁸ The GMA authorized the Washington State Department of Community Development (DCD) to extend any of these deadlines for up to one hundred eighty days.¹⁹ And as for larger and faster growing counties²⁰ and the cities within

8. *Id.* § 36.70A.020 (1992).

9. *Id.* § 36.70A.040.

10. WASH. REV. CODE § 36.70A.020(8) (1992).

11. *Id.* § 36.70A.020(9).

12. *Id.*

13. *Id.* § 36.70A.020(10).

14. *Id.* § 36.70A.170.

15. WASH. REV. CODE § 36.70A.170 (1992).

16. *Id.* § 36.70A.030.

17. *Id.* § 36.70A.060.

18. *Id.*

19. *Id.* § 36.70A.380.

20. Other counties may choose to plan under the GMA. WASH. REV. CODE

them, the GMA does not require their adoption of comprehensive plans until July 1, 1993.²¹

Requiring the development regulations for resource lands and critical areas to be adopted prior to the implementation of comprehensive plans serves to protect those resources from irreversible impacts prior to the completion of the plans and preserves management options that can be considered during the subsequent comprehensive planning process.

Within one year after the adoption of its comprehensive plan, each city and county that is required or chooses to plan under the GMA must enact development regulations that are consistent with and implement its comprehensive plan.²² Each county and city that plans under the GMA must then review its designations and development regulations when it adopts its comprehensive plan and implementing development regulations to ensure consistency.²³ Afterwards, if needed, each county and city may alter its designations and regulations.²⁴

This allows, and may require, cities and counties to amend their development regulations after their comprehensive plans and implementing regulations are adopted. For this reason, some see the development regulations being adopted before the comprehensive plans as interim regulations that can be improved on once further planning studies are completed and comprehensive plans are adopted. Others believe that the development regulations now being adopted for critical areas and resource lands are likely to be the first step toward a permanent growth management system and that the regulations will not be amended in any significant way once the plans are adopted.

Nearly all the work involved in adopting the development regulations falls on the shoulders of local governments. These governments vary a great deal in the size and expertise of their professional staffs, the funds they have available to hire consultants and additional staff, the experience they have with these issues, and the information available to them about the

§ 36.70A.040 (1992). Those counties and cities who so choose, as well as other jurisdictions who are later required to plan under the GMA as a result of growth, are required to complete comprehensive plans within three years from the date they choose to plan. *Id.*

21. *Id.*

22. *Id.* § 70A.120.

23. *Id.*

24. *Id.* § 36.70A.130.

resources in their jurisdiction.²⁵ These governments also vary in the kinds of regulations that they have previously adopted, the degree of political support and opposition to growth management in their area, the degree of cooperation they share with neighboring jurisdictions, and the physical nature of the resources within their jurisdictional boundaries. This variety in the circumstances under which regulations are being developed is reflected in the variety of approaches taken in meeting the GMA requirements.²⁶

Still, state government has a role to play in this process. The state's role includes financial assistance, technical assistance and mediation services,²⁷ commenting on draft plans and regulations,²⁸ and enforcement of the GMA requirements.²⁹ According to DCD, appropriations from the legislature to help cities and counties implement the GMA during its first year after adoption (1990) totaled \$7.4 million.³⁰ The money was allocated to twenty-four counties, which collaborated with the cities within them in determining how the money would be divided.³¹ Each county received \$75,000 with additional amounts based on population.³² In 1991, base grants to counties were increased to \$100,000.³³ Nevertheless, almost all local governments have had to spend local funds to meet GMA requirements. In fact, state grants typically cover only thirty to forty percent of local governments' costs of meeting the GMA requirements. Thus, other financial priorities have made planning under the GMA difficult for some jurisdictions.

In addition to funding grants, the state has provided technical guidance and assistance. DCD, for example, adopted Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas (*Minimum Guidelines*) for counties and cities to consider.³⁴ These administrative rules provide definitions and classification systems for critical areas and

25. See WASH. STATE DEPT. OF COMMUNITY DEV., GROWTH MANAGEMENT DIV., GROWTH MANAGEMENT DATA INVENTORY AND COLLECTION REPORT 28-42 (1990).

26. See *infra* part VI.

27. WASH. REV. CODE § 36.70A.190 (1992).

28. *Id.* § 36.70A.106.

29. *Id.* §§ 36.70A.280, .340.

30. Telephone Interview with Nick Turnbull, Program Developer, Washington State Department of Community Development (Mar. 17, 1993).

31. *Id.*

32. *Id.*

33. *Id.*

34. WASH. ADMIN. CODE ch. 365-190 (Supp. 1991).

resource lands. They also direct planners to data sources and suggest criteria for planners to consider when classifying parcels as resource lands and/or critical areas. There are, however, no state guidelines for those development regulations that focus on conserving and protecting the designated areas.³⁵ The *Minimum Guidelines* are not mandatory, and it remains the responsibility of local governments to establish their own classification scheme, designation process, and development regulations.

DCD also compiled the Planning Data Source Book for Resource Lands and Critical Areas (*Planning Data Source Book*) that provides cities and counties with sources of data for classifying and designating resource lands and critical areas.³⁶ The *Minimum Guidelines* were published in December of 1990 and the *Planning Data Source Book* was published in February of 1991, nine and seven months, respectively, before the September 1, 1992, deadline for the adoption of development regulations by local governments who plan under the GMA.³⁷

In addition to providing technical assistance, the state has oversight and enforcement capabilities to ensure that local governments conform with the GMA requirements. These capabilities include the option of all state agencies to provide comments on local plans and development regulations during the public review and comment period.³⁸ The newly created growth management hearings boards can also hold hearings and determine whether local governments are complying with the requirements of the GMA.³⁹ Additionally, the Governor has the right to sanction local governments who do not comply with orders of the hearings boards or the requirements for county-wide policies⁴⁰ by withholding tax revenues normally distributed to them.⁴¹

While the state has a role in providing guidance, assistance and enforcement, it may not have the resources or be the

35. Part of the WASHINGTON ADMINISTRATIVE CODE has been reserved for this purpose and DCD may adopt procedural criteria for development regulations in the future. See WASH. ADMIN. CODE ch. 365-195, pt. 8 (1992).

36. WASHINGTON STATE DEP'T OF COMMUNITY DEVELOPMENT, PLANNING DATA SOURCE BOOK FOR RESOURCE LANDS AND CRITICAL AREAS 22-168 (1991) [hereinafter PLANNING DATA SOURCE BOOK].

37. WASH. REV. CODE § 36.70A.060 (1992).

38. *Id.* § 36.70A.106.

39. *Id.* §§ 36.70A.250, .280.

40. *Id.* § 36.70A.210(2)(c).

41. *Id.* § 36.70A.340(2).

appropriate entity to monitor implementation of the GMA. Experience in other states indicates, however, that unless local government efforts are carefully monitored and evaluated, the state as a whole could easily veer off course.⁴² This would result in the irretrievable loss of natural resources and wasted effort by public officials and community activists in what is proving to be an enormous planning effort.⁴³

III. STUDY APPROACH

In the University of Washington Study, we collected development regulations, which are being used to comply with the requirement to conserve resource lands and protect critical areas, from a representative sample of cities and counties throughout Washington State. We compared the development regulations to each other using a technique known as "content analysis," in which different types of approaches to the regulations' various elements were identified and tabulated.⁴⁴ We also compared the regulations to Washington State's *Minimum Guidelines*,⁴⁵ guidelines from other states,⁴⁶ and guidelines available in the professional literature.⁴⁷ The purpose of comparing the regulations to each other was to determine the range and frequency of the different approaches being adopted. The purpose of comparing the regulations to Washington State's *Minimum Guidelines* was to determine how many jurisdictions are following those guidelines. The purpose of comparing the regulations to guidelines from other states and the professional literature was to determine how the regulations compared to recommended practice around the nation.

42. For example, in Florida, "[a]bout half of the local plans submitted [by local governments for state review] were found initially to be not in compliance." JOHN M. DEGROVE, *PLANNING AND GROWTH MANAGEMENT IN THE STATES: THE NEW FRONTIER FOR LAND POLICY* 15 (Lincoln Institute for Land Policy 1992).

43. See GARY PIVO & DAVID ROSE, *TOWARD GROWTH MANAGEMENT MONITORING FOR WASHINGTON STATE* (Washington State Institute for Public Policy 1991).

44. See DAVID NACHMIAS AND CHAVA NACHMIAS, *RESEARCH METHODS IN THE SOCIAL SCIENCES* 332-39 (3d ed. 1987).

45. WASH. ADMIN. CODE ch. 365-190 (Supp. 1991).

46. See, e.g., MAINE DEPARTMENT OF INLAND FISHERIES AND WILDLIFE, *CONSERVATION OF INLAND FISHERIES AND WILDLIFE HABITAT* (1990). See also sources cited *infra* note 111.

47. See, e.g., WILLIAM TONER, *SAVING FARMS AND FARMLANDS: A COMMUNITY GUIDE*, *PLANNING ADVISORY SERVICE REPORT NO. 333* (American Society of Planning Officials 1978). See also sources cited *infra* note 111.

A. Selecting the Sample

Before selecting our study sample, all of the cities and counties in the state were stratified according to their size and location east and west of the Cascade mountains. This was done to ensure that different types of jurisdictions were represented in the study.

We obtained a list from DCD of jurisdictions that were expected to complete their development regulations on or before March 1992, and we used the list as the source of the sample.⁴⁸ From each location and population strata we then randomly selected a ten percent sample of those cities and counties that were required or chose to plan under the GMA. The selected jurisdictions were asked to submit a copy of their development regulations to the study team. The final sample included forty-two jurisdictions.

Table 1 describes the sample by population size, class, location, and type of jurisdiction. Because the sample is representative of the total population of jurisdictions in the state, it can be used to make inferences about all of the state's cities and counties with a reasonable degree of confidence. However, inferences can only be made about the population of jurisdictions as a whole and not about any individual jurisdiction.

Monitoring Project Sample					
Cities	<2,000	2,000-15,000	15,000-50,000	>50,000	Total
East	8	3	2	1	14
West	6	6	3	1	16
Total	14	9	5	2	30
Counties	<6,000	6,000-20,000	20,000-100,000	>100,000	
East	1	2	2	1	6
West	1	2	2	1	6
Total	2	4	4	2	12
				Total All	42

Table 1. The sample included twenty-seven jurisdictions total, with proportionate representation from cities and counties in eastern and western Washington.

48. WASHINGTON STATE DEPT OF COMMUNITY DEVELOPMENT, GROWTH MANAGEMENT DIVISION, STATUS REPORT ON JURISDICTIONS PLANNING UNDER THE GROWTH MANAGEMENT ACT, DESIGNATING AND PROTECTING CRITICAL AREAS AND RESOURCE LANDS (Feb. 20, 1992).

B. *Analyzing the Development Regulations*

We analyzed the following elements in each set of development regulations:

- (1) **Definition/Classification System**—how do jurisdictions define and classify critical areas and resource lands?
- (2) **Permit Application Requirements**—what information do the regulations require in development permit applications?
- (3) **Activities Allowed Without a Permit**—what activities or uses are allowed in critical areas and resource lands without obtaining a permit?
- (4) **Activities Allowed With a Permit**—what activities or uses require a permit?
- (5) **Prohibited Activities**—what activities are not allowed at all?
- (6) **Development Standards**—what standards are required for new building and construction?
- (7) **Permit Procedures**—what procedures (e.g., notice requirements and variance procedures) must be followed to receive a permit?

We began our analysis by listing all of the different approaches that were found in each of the regulations pertaining to our chosen elements. For example, a list was prepared of the different definitions used for fish and wildlife habitat conservation areas. A matrix giving the type of approaches used by each jurisdiction for each regulation element was employed to count the number of times that each approach was used and to show differences and similarities among those approaches.

After the similarities and differences among the approaches were identified and the frequency of each approach was calculated, we judged the restrictiveness of the various requirements.⁴⁹ We also compared the regulations to the *Minimum Guidelines* promulgated by DCD to determine how closely the regulations actually conformed with DCD's guidelines. Finally, the regulations were compared to guidelines from other states and the professional literature.

49. Restrictiveness was judged by considering the detail, comprehensiveness, and difficulty of the requirements. Restrictiveness does not encompass other important dimensions such as effectiveness, strictness, or significance. See discussion *infra* part VI.B.

IV. THE DEADLINE

A. Most Jurisdictions Met the Deadline But Many Did Not

As previously noted, the legislature gave DCD the authority to extend deadlines for completing the development regulations.⁵⁰ This meant that it was possible for counties and cities who either were required or chose to plan under the GMA to have their deadline extended from September 1, 1991, to March 1, 1992.

As Table 2 indicates, we found that twenty-two percent of these cities and counties did not even meet their extended March deadline. Furthermore, the actual percentage statewide that missed the deadline is probably higher because we selected our sample from jurisdictions that had originally anticipated finishing by March 1992.

Status of Critical Area and Resource Land Development Regulations as of March 1992			
	Done	Not Done	Not Applicable
Wetlands	(21) 78%	(6) 22%	(0) 0%
Aquifer Recharge	(12) 45%	(6) 22%	(9) 33%
Fish and Wildlife	(18) 67%	(6) 22%	(3) 11%
Frequently Flooded	(19) 70%	(5) 19%	(3) 11%
Geologic Hazards	(19) 70%	(6) 22%	(2) 8%
Agriculture	(6) 22%	(6) 22%	(15) 56%
Forest	(4) 15%	(7) 26%	(16) 59%
Mineral	(5) 18%	(7) 26%	(15) 56%

Table 2. By surveying our sample of local jurisdictions, we found twenty-two percent of the cities and counties in our study had not completed one or more of the required regulations. The number of jurisdictions is given in parentheses.

No studies have been conducted to determine why some jurisdictions failed to meet the deadlines. However, a recent national survey, conducted by the Author, suggests that the factors which contribute to the adoption of regulations of this type by local governments include a clear state mandate, adequate staff capacity, a strong local comprehensive plan, and active and influential interest groups.⁵¹

50. WASH. REV. CODE § 36.70A.380 (1992). See discussion *supra* part II.

51. See GARY PIVO ET AL., LOCAL GOVERNMENT PLANNING TOOLS, GROWTH

The absence of these factors in some of Washington's communities may have contributed to the delays. When the GMA was first passed in 1990, the Governor's Growth Strategies Commission was already working on recommendations for substantial 1991 amendments.⁵² This generated uncertainty about what the final state mandate would be and probably delayed an early start by some local governments on work that needed to be done. Also, DCD was not prepared to provide technical assistance to local governments immediately after the passage of the GMA because it had not yet developed its assistance capabilities. Thus, local governments were largely on their own during their initial work on the development regulations. Many jurisdictions also had limited staff and financial capacity to complete the work. Financial difficulties were aggravated by the state not releasing planning grants to local governments immediately after the GMA was passed. In addition, many communities were confronted with local disagreements on how their regulations should be drafted, interest groups that were not organized to provide early advice on what they wanted in the regulations, limited commitment and resistance among some local leaders to adopting the regulations, an absence of existing comprehensive plan policies and implementing regulations that could be built upon, and a scarcity of technical information about model ordinances and the location and nature of the resources requiring conservation or protection.⁵³

It would be useful to know whether some kinds of communities are more prone to delays than others. This could help us predict which are likely to have problems meeting deadlines in the future and whether the delays should be of major concern. Delayed communities may fall into two groups. One group probably contains smaller towns with small staffs that lack resources and experience with this kind of planning. The other group probably contains jurisdictions that lie on the frontier of urbanization and are experiencing a great deal of land speculation; these places may have the planning capacity but are under pressure from land speculators to move slowly on growth management.

MANAGEMENT PLANNING AND RESEARCH CLEARINGHOUSE, UNIVERSITY OF WASHINGTON, COLLEGE OF ARCHITECTURE AND URBAN PLANNING (1992).

52. See generally WASHINGTON STATE GROWTH STRATEGIES COMMISSION, A GROWTH STRATEGY FOR WASHINGTON STATE (1990).

53. These delays are not so surprising if one reviews the history of similar efforts in other states. See generally DEGROVE, *supra* note 42.

The implications of the delays are worth considering. The development regulations were required for early growth management action in order to protect and conserve options for future comprehensive planning and to avoid harm to the resource lands and critical areas while the comprehensive plans are being prepared. Even though the delays occurred during a slowdown in development associated with a national recession, a significant number of projects under construction or review have vested rights under the development standards that were in place at the time their permit applications were completed.⁵⁴ Delays in adopting regulations are most worrisome where there is both a significant amount of development underway or under review and where pre-existing development regulations for conserving and protecting resource lands and critical areas are weak or non-existent. Under these circumstances, delays in the adoption of development regulations could result in significant harm to resource lands and critical areas contrary to the goals of the GMA.

Evidence from our study suggests that delays are occurring in places with significant growth and weak pre-existing regulations.⁵⁵ It is likely that many of the same factors that caused these places to be delayed initially will also delay their adoption of the required comprehensive plans and development regulations. A mechanism is needed to address this problem. This could include, for example, a requirement that once a deadline is passed, a model state ordinance must be adopted locally until a local ordinance can be developed. Alternatively, a state permit might be required for projects that have the potential to significantly harm or contribute to cumulative adverse impacts on a critical resource.

B. Most Cities and Counties Have Not Adopted Regulations for Some Types of Critical Areas, Claiming that They Do Not Exist in Their Jurisdiction

Table 2 shows that thirty-three percent of the jurisdictions in our study claimed not to contain areas with a critical recharging effect on aquifers used for potable water and there-

54. During fiscal year 1991-92, Washington had the fifth fastest population growth rate of any state in the nation according to the U.S. Census Bureau. See Ramon G. McLeod, *Migrants, Births Swell State Population*, SAN FRANCISCO CHRONICLE, Dec. 30, 1992, at A2.

55. The most common examples are counties located on the outer edge of metropolitan areas.

fore did not adopt regulations for them. Table 2 also shows that fifty-nine percent of cities and counties indicated that they did not contain forest resource lands appropriate for designation and conservation under the GMA. This figure includes a few cities that did not designate forest lands qualifying as resource lands of long-term commercial significance because they had not enacted a program authorizing the transfer or purchase of development rights. Such a transfer or purchase is required by the GMA before forest lands or agricultural lands can be designated within an urban growth boundary.⁵⁶

This finding underscores the fact that the GMA contains rather narrow definitions of some natural resources and critical areas, and, as a result, many of the development regulations analyzed in the University of Washington study will not conserve and protect all of the natural resources and environmentally critical areas that are important to the state. The definitions exclude portions of the state's resource lands and critical areas because of their tendency to focus on resources with economic utility in the case of forest lands, agricultural lands, mineral resources, and aquifer recharge areas. For example, the definition for forest lands only includes areas with "long-term commercial significance for growing trees commercially,"⁵⁷ and the definition for aquifer recharge areas only includes areas with an "effect on aquifers used for potable water."⁵⁸ There are many forest, agricultural, and aquifer recharge areas that do not meet these definitions and are therefore not being conserved or protected by the development regulations.⁵⁹

However, many forest lands, aquifer recharge areas, and other natural resources are significant to the state for reasons other than their commercial utility. For example, aquifer recharge areas may exist that are not used for potable water but help maintain flows in streams that are used for recreational, ecological, or cultural purposes. Many resource lands and critical areas are important to conserve and protect because of the noncommercial benefits they generate. Curr-

56. WASH. REV. CODE § 36.70A.060 (1992).

57. *Id.* § 36.70A.030(8).

58. *Id.* § 36.70A.030(5).

59. A study currently underway by the Washington Environmental Council, under a grant from The Bullitt Foundation, is finding that in some counties the majority of forest resources are not being designated and regulated under Section 6 of the GMA. *Id.* § 36.70A.060.

rently, however, they fall outside the utilitarian definitions contained in the GMA.

Other sections of the GMA suggest that resource lands and critical areas that are not subject to the regulations studied here should be conserved or protected in any case. In particular, the GMA sets forth goals that call for the conservation and protection of resources and the environment.⁶⁰ While the requirement for development regulations for certain kinds of resource lands and critical areas may not guarantee their protection, legislative inclusion of these goals in the GMA suggests that protective measures which conserve and protect all aquifer recharge areas, forest lands without long-term commercial significance, and other resources of the state should be included in the comprehensive plans. Similarly, protective measures should be included in city and county implementing ordinances.

Our finding that most jurisdictions are not regulating certain types of resource lands or critical areas, on the grounds that they do not exist within their boundaries, raises the question of whether or not some critical areas and natural resources that are required to be protected by the mandatory development regulations are being regulated. Whether or not a jurisdiction adopts the required regulations for certain resource lands and critical areas depends on whether it has designated any such areas within its jurisdiction, which in turn depends on how the jurisdiction interprets and applies the definitions for resource lands and critical areas that are contained in the GMA. The definitions being used for resource lands and critical areas by local governments vary greatly across the state.⁶¹ The result is that resource lands and critical areas of the same character that are not designated and regulated in one jurisdiction may be designated and regulated in another. This causes the unequal treatment of similar properties in different jurisdictions. More importantly, some jurisdictions may not be regulating some areas that they would be regulating if they used more common definitions.

60. *Id.* § 36.70A.020.

61. *See infra* part VI.

V. APPROACHES BEING TAKEN: WHILE MOST JURISDICTIONS HAVE ADOPTED SEPARATE RESOURCE LANDS AND CRITICAL AREAS ORDINANCES, TWENTY-FIVE PERCENT OF THE JURISDICTIONS ARE USING THE SEPA PROCESS OR SHORELINE MASTER PROGRAMS INSTEAD

Several jurisdictions are deferring the adoption of development standards for critical areas and resource lands by using existing SEPA procedures.⁶² Instead of adopting development regulations as a local ordinance, those using SEPA are reviewing the impacts of development actions on resource lands and critical areas on a case-by-case basis. This is being done most often for areas with a critical recharging effect on aquifers used for potable water and forest resource lands. While it is possible to adopt detailed standards in advance of individual development applications as local SEPA policies, that is generally not the approach we found being taken.

Jurisdictions are probably turning to SEPA because of their uncertainty about what development standards they should adopt and where their resource lands and critical areas are located, and their desire to avoid costly inventories and political controversy caused by adopting specific regulations. Under these circumstances, it is understandable that some jurisdictions have turned to the flexible and discretionary approach provided by SEPA. SEPA permits them to determine whether resource lands and critical areas are present on a particular parcel at the time an environmental checklist is being prepared for a particular development.⁶³ Furthermore, SEPA permits them to deny development permission or to require mitigation measures as a condition of approval based on the characteristics of the parcel, the proposed project, and its possible environmental impacts.⁶⁴ It also allows the cost of inventorying resource lands and critical areas to be deferred and later charged to development applicants.⁶⁵

On the other hand, the SEPA approach generates several problems. The first problem is that SEPA was designed to allow decision-makers to balance environmental information with other considerations. It does not require environmental

62. WASH. REV. CODE ch. 43.21C (1992).

63. WASH. ADMIN. CODE § 197-11-315 (1990).

64. *Id.* § 197-11-660.

65. *Id.* §§ 197-11-420(4), -914.

protection without regard for other goals.⁶⁶ While the GMA absolutely requires the conservation of resource lands and the protection of critical areas, the SEPA process is designed to allow the benefits of conservation and protection to be balanced against the benefits of doing otherwise as long as the tradeoffs are made explicit.

A second problem is the uncertainty and cost associated with SEPA. If development standards are not established until projects are proposed, landowners, developers, and citizens must exist under a cloud of uncertainty until a development application is made, and then they must expend significant amounts of time and money resolving disputes over what mitigation measures should be required.

A third problem is that environmental management decisions will become fragmented into many case-by-case decisions. It is, in fact, partly because of the flaws inherent in this incremental approach to land use decision-making that we have needed to turn to the more comprehensive and holistic approach represented by comprehensive planning and development regulations under the GMA. Short-term financial gains are often given more weight during the development permit process than during the process for adopting jurisdiction-wide regulations. Thus, the degree of conservation and protection generated by using SEPA may be less than that provided by the adoption of a set of jurisdiction-wide development regulations in advance of the development permit process.

An alternative approach could be devised that accounts for the uncertainty about resource conditions and their variability across a jurisdiction, while at the same time recognizing the need to make decisions at the jurisdiction-wide level to provide predictability and community participation. Indeed, some jurisdictions are already using this approach. They are doing so by including formulas in their development regulations that determine the development standards that would apply depending on an individual parcel's characteristics. Those

66. See, e.g., RICHARD L. SETTLE, *WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE* (1983).

[SEPA] does not . . . dictate the particular result of the balance to be struck by decision-makers in individual cases. There may be many considerations—economic, legal, social, political, technical, to name a few—which the responsible public officials may wish to weigh in making a decision which involves taxpayer dollars or the use of public regulatory authority.

Id. at 183.

regulations can also give some discretion to local officials to increase or decrease the standards to fit individual circumstances.

VI. COMPARISONS WITHIN WASHINGTON STATE

A. *There is a Great Deal of Variety in the Definitions, Development Application Requirements, Development Standards, and Other Elements of the Regulations*

Table 3 shows the number of significantly different approaches that were found for certain elements of the regulations and the percentage of jurisdictions using the most common approaches. Lack of common ground among the jurisdictions is apparent. For wetlands, for example, we found four different definitions, six different sets of activities allowed without a permit, and fourteen different sets of development standards.⁶⁷ The least variety in the wetlands regulations was found in the definitions,⁶⁸ while the greatest variety was found in the development standards.⁶⁹ This variety is also reflected in a broad range of development standards. For example, wetland buffer requirements in different jurisdictions range from seventy-five feet to three hundred feet for Class 1 wetlands (the highest quality class of wetlands).

We also found little consistency in the definitions or development standards used for fish and wildlife habitat conservation areas. Eleven different definitions of fish and wildlife

67. We considered elements to be different if the characteristics of the development project or permit process they would generate would be significantly different. Ordinance elements that did not have materially different implications for these outcomes were not considered different.

68. The most common definition was the one recommended in the *Minimum Guidelines*:

"Wetland" or "wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities. However, wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate conversion of wetlands, if permitted by the county or city.

WASH. ADMIN. CODE § 365-190-030 (Supp. 1991).

69. As shown in Table 3, only fourteen percent of the jurisdictions use the most common set of development standards.

Variety in Development Regulation Elements					
	# Of Different Approaches	% Using Most Common Approach	City	County	Total
WETLANDS					
Definition	4	57	50	56	56
Federal Manual	2	43	100	56	56
Classification	3	36	100	39	39
Allowed Activities w/o Permit	6	36	75	33	33
Development Standards	14	14	50	11	11
AQUIFER RECHARGE AREAS					
Definition	3	50	75	60	60
Allowed Activities w/o Permit	2	33	0	20	20
Development Standards	6	50	25	40	40
FISH AND WILDLIFE					
Definition	11	23	50	16	16
Allowed Activities w/o Permit	3	46	100	53	53
Development Standards	15	15	25	11	11
FEQUENTLY FLOODED AREAS					
Definition	5	67	100	75	75
Allowed Activities w/o Permit	5	17	25	13	13
Development Standards	11	42	50	31	31
GEOLOGIC HAZARDS					
Definition	9	21	67	18	18
Allowed Activities w/o Permit	3	64	100	71	71
Development Standards	14	14	33	18	18

Table 3. Comparing the regulations to each other, we found a great deal of variety among their definitions, development application requirements, development standards and other elements. For wetlands, for example, we found 4 different definitions and 14 different sets of development standards.

habitat and fifteen different sets of development standards were identified. For example, required buffers for Class 1 watercourses range from fifty feet to one hundred fifty feet.

Significant variety also exists in the development regulations for areas with a critical recharging effect on aquifers used for potable water. Our analysis identified three different definitions of these areas and six different sets of development standards. The development standards range from the simple requirement to minimize the exposure of aquifer recharge

areas to the introduction of contaminants, to the detailed listing of specific substances or materials that should be contained and monitored, how this will be accomplished, and how land uses on these areas can occur.

Development regulations for frequently flooded areas appear to be strongly influenced by the National Flood Insurance Program.⁷⁰ However, we found some variety, including five different definitions, five different sets of activities allowed without a permit, and eleven different sets of development standards.⁷¹

The approaches taken in regulating geologically hazardous areas also exhibit significant variety. We identified nine approaches to defining geologically hazardous areas. Three of the nine definitions contained five categories, including erosion, landslide, seismic, volcanic, and mine hazard areas. The other six excluded one or more of these, with volcanic hazard areas being most frequently omitted. The fourteen different sets of development standards showed little similarity to one another.

As stated in Section I, the variety of circumstances related to staff, information, politics, resources, funding, and experience under which the communities are developing regulations may help to explain the variety of approaches that we found. Indeed, the GMA is designed to allow local governments to use a diversity of approaches in meeting state goals.⁷² Moreover, a recent study by the Author found that local government planning directors believe that tailor-making tools to fit a community is an important factor in making tools highly effective.⁷³

70. 42 U.S.C. § 4001 (1988). The National Flood Insurance Program provides federally subsidized flood insurance to residents of communities that participate in the program. The prime requirement for community participation is the establishment of satisfactory land use controls to regulate development within areas identified as having special flood hazards. In order to qualify for the program, a flood-prone community must adopt adequate land use control measures that are consistent with federal criteria set out in federal regulations. 42 U.S.C. § 4001 (1988); 44 C.F.R. § 59 (1992).

71. For example, one approach to development standards is to simply state that development should be minimal (e.g., agriculture, golf courses, and very low-density residential). Another example is to state that new homes shall be anchored, construction materials should be flood resistant, water supply, sewage and waste disposal systems must avoid floodwater infiltration, new residential construction must be elevated above flood level, and other specific standards must be met.

72. "Within the framework established by the Act, a wide diversity of local visions of the future can be accommodated. Moreover, there is no exclusive method for accomplishing the planning and development regulation requirements of the Act." WASH. ADMIN. CODE § 365-195-020 (Supp. 1992).

73. See generally PIVO ET AL., *supra* note 51.

The key unanswered question, however, is when should a local approach be considered too inconsistent with the requirement of the GMA to adopt development regulations that protect critical areas and conserve resource lands.

The GMA does provide limits beyond which diversity should not be tolerated. For instance, the GMA requires cities and counties to adopt development regulations "that protect critical areas"⁷⁴ and "assure the conservation of agricultural, forest, and mineral resource lands"⁷⁵ designated under the GMA. Of course this requires an interpretation of the terms "protect" and "conservation." On the basis of the following discussion, I believe that the term "protect" indicates a desire on the part of the legislature to keep critical areas from being reduced in quality beyond their present condition. This term indicates that impacts on critical areas should be absolutely limited to a level that they can absorb without being harmed. This interpretation is underscored when the term is used, as it is in the GMA, in juxtaposition with the term "conservation," which is the direction for forest, agricultural, and mineral resource lands. The use of such terms in this way indicates that the legislature was distinguishing between resources that should be conserved and critical areas that should be protected.

This interpretation of "protect" follows both the way the term has been used by land use planners and policymakers and the way it is defined in the dictionary. For example, the *Lexicon Webster Dictionary* defines "protect" as "to cover or shield from danger or injury."⁷⁶ The dictionary goes on to define "injure" as "to impair the excellence, value or strength of,"⁷⁷ and "impair" as "to make worse; to lessen in quality, quantity, value, excellence" or "to deteriorate."⁷⁸ Thus, the requirement to protect should be taken as a requirement to shield critical areas from being lessened in quality, quantity, value, or excellence. This is tantamount to a nondegradation standard.

One court has interpreted the term "protect" in a similar fashion. In *In re North Carolina Forestry Foundation*,⁷⁹ the term "protected natural area" was found "to mean property which, insofar as possible, is kept in a *pristine state free from*

74. WASH. REV. CODE § 36.70A.060 (1992).

75. *Id.*

76. THE LEXICON WEBSTER DICTIONARY 767 (1986).

77. *Id.* at 495.

78. *Id.* at 479.

79. 242 S.E.2d 492 (N.C. 1987).

those interferences which any given generation may feel to be 'improvements' on nature."⁸⁰ This implies that a protected area is one that is kept in its natural state, not impaired, and not allowed to deteriorate.

Significantly, in 1991, the legislature added the requirement that development regulations "protect" critical areas.⁸¹ This language replaced the previous language passed in 1990 that local governments adopt regulations "precluding land uses or development that is incompatible with the critical areas that are required to be designated"⁸² This change represents a strengthening of the requirement because it widens the scope of concern of the development regulations from only addressing incompatible land uses and development to addressing any activity that may prevent their protection. It also strengthens the GMA by offering protection as a more specific target for the regulation of critical areas. The previous target, which was to preclude incompatible land uses and development, required that an assumption be made about the uses of the critical areas with which land uses and development should not be incompatible. The change in language now implies that land uses, development, and any other actions should be regulated to prevent the lessening in quality, quantity, value, or excellence of critical areas.

There is also conventional meaning suggested by planners and policymakers when they use the term "conservation." According to one source, "[c]onservation means to manage in a manner which avoids wasteful or destructive uses and provides for future availability. It should not be confused with preservation."⁸³ Similarly, according to a federal source, "[conservation] is the use of a resource in a way that ensures the resource can continue to be used by future generations."⁸⁴ Where one runs into trouble, however, is determining which uses of a resource are to be conserved, particularly when various uses are not fully compatible. Even though the GMA defines forest land and agricultural land in terms of commercial production,

80. *Id.* at 501 (emphasis added).

81. ReSHB 1025, 52nd Leg., 1st Spec. Sess., 1991 Wash. Laws 2903, ch. 32, § 21(2).

82. ESHB 2929, 51st Leg. 1st Ex. Sess., 1990 Wash. Laws 1972, ch. 17, § 6(1).

83. WASHINGTON STATE PLANNING AND COMMUNITY AFFAIRS AGENCY, LOCAL GOVERNMENT SERVICES DIVISION, *THE LANGUAGE OF PLANNING: A GLOSSARY OF SELECTED LAND USE PLANNING AND ZONING WORDS AND PHRASES* 9 (1981).

84. See CHARLES F. SCHWARZ ET AL., *WILDLAND PLANNING GLOSSARY* 50-51 (USDA Forest Service General Technical Report 1976).

that definition should not be seen to imply permission to allow unbridled deterioration of other uses being provided by these lands, such as their recreational or habitat values. The planning goals in the GMA encourage the retention of open space, the development of recreational opportunities, the conservation of fish and wildlife habitat, and the enhancement of water quality and quantity.⁸⁵ These goals therefore indicate that development regulations should conserve more than commercial uses.

Thus, development regulations conform with the requirements of the GMA only when they ensure that agricultural and forest and mineral resource lands can continue to be used by future generations, not only for the commercial production of food, fiber and mineral products, but also for open space, recreation, and environmental uses. Variations in the ordinances that allow development to exceed these standards should not be found in compliance with the GMA. For example, if an ordinance aimed at protecting wetlands through development standards that, in combination, allow such development to degrade the wetland's habitat, aesthetic, hydrological, or other functional characteristics,⁸⁶ then that ordinance should fail to satisfy the requirements of the GMA. Under the interpretation of protection presented above, degradation should not be tolerated because it is equivalent to the lessening of value. Because of the way the term "protect" is interpreted here, and because the GMA requires local governments to protect critical areas, it is incorrect to argue that the GMA allows local community values to dictate the level of degradation that is permissible.⁸⁷ The GMA requires a specific degree of protection, and it only allows applying local interpretations when those interpretations fall within the limits of the statewide mandate.⁸⁸

In addition, there are other requirements in the GMA that may further constrain permissible variations contained in local regulations. The GMA requires the coordination of plans among jurisdictions that share common borders or related regional issues.⁸⁹ It also requires development regulations to

85. WASH. REV. CODE § 36.70A.020 (1992).

86. The wetlands can be inside or outside of the jurisdiction. Under the GMA, a jurisdiction should not allow jurisdictional boundaries to limit its responsibilities.

87. WASH. REV. CODE § 36.70A.060(2) (1992).

88. *Id.*

89. *Id.* § 36.70A.100.

be made consistent with coordinated plans.⁹⁰ Several planning goals are served by coordinating development regulations among jurisdictions, including those for housing, permits, natural resource industries, open space and conservation, environment, and citizen participation and coordination.⁹¹ Progress toward these goals would be impaired, for example, if jurisdictions sharing common watershed and habitat areas adopted radically different critical area regulations. The adoption of different regulations would create a regulatory web that could impair timely permitting, reduce citizen participation, increase the cost of housing, and impede other goals.

Some of the development regulations that have been adopted to conserve resource lands and protect critical areas fail to meet the standards outlined above. This will become more apparent in subsequent sections, which discuss those standards in comparison to the guidelines adopted by Washington State agencies and agencies of other states.⁹² Variety is not by itself a problem. Indeed, variety can promote effectiveness by allowing regulations to be tailored to local conditions, but, in several cases, variety has probably exceeded the standards provided or implied by the GMA.

B. The Regulations Vary in Their Restrictiveness: A Significant Portion of Cases are Either Highly Restrictive or Unrestrictive Compared to Most Jurisdictions

Restrictiveness of development regulations relates to the level of protection the regulations provide and to the constraints they place on the use of private property.⁹³ To determine the relative restrictiveness of development regulations in our sample jurisdictions, various elements of the local regulations were arrayed along a restrictiveness scale. Because regulations were only ranked relative to other regulations from the same state, the scores should not be interpreted in an absolute sense. This means, for example, that an element which was scored as highly restrictive may be more or less restrictive than the most highly restrictive elements being used by local governments in other states. In fact, based on our comparison

90. *Id.* § 36.70A.120.

91. *Id.* § 36.70A.020.

92. *See infra* parts VII, VIII.

93. *See supra* note 49 and accompanying text.

to other states' guidelines,⁹⁴ it appears likely that some regulations falling in the slightly or moderately restrictive range may be less restrictive than their counterparts in other states.

Restrictiveness is only one of many dimensions along which the regulations might be arrayed. Others might include strictness, effectiveness, and significance, each of which is different from what we mean by restrictiveness. A jurisdiction's regulations might be very restrictive, but they will not be very significant if the jurisdiction is not growing. The effectiveness of such regulations will only be as great as their actual effect on final development and planning outcomes. Similarly, even restrictive regulations will not be very strict if variances are easily obtained. Restrictiveness, therefore, is obviously not the only dimension that should be of interest. Further studies looking at these other dimensions would be useful.

We analyzed restrictiveness both for individual elements within the regulations and for regulations as a whole.⁹⁵ Individual elements in each regulation were examined separately. We then determined the distribution of these elements across the categories of restrictiveness (e.g., slightly, moderately, highly).

Most individual elements fall in the moderately restrictive category. One notable exception, however, is with respect to the development standards for geologically hazardous areas, where most elements fall in the slightly restrictive range.

As Figure 1 illustrates, when all of the elements of a regulation are considered together and used to give each regulation a restrictiveness score as a whole, most regulations fall into the moderately restrictive range. Very few regulations are ranked slightly or highly restrictive. Specifically, seventy-one percent of the regulations are moderately restrictive, while twenty-nine percent are slightly or highly restrictive.

This analysis gives us additional clues about the adequacy of the development regulations being adopted under the GMA. In addition to directly interpreting the GMA's language and then evaluating a regulation in terms of that interpretation, one can evaluate a local regulation by comparing it to the typical approaches being taken by other local jurisdictions. This approach uses the practices of typical local jurisdictions as a

94. See *infra* part VIII.

95. Individual elements included, for example, definitions, development regulations, and land uses allowed without a permit. See *supra* part III.B.

gauge of how to interpret the requirements of the GMA. The level of protection or conservation provided by a jurisdiction would be considered inadequate if its regulations deviate significantly from the standards that are typically adopted by other local jurisdictions. This determination is most reasonable when a large proportion of jurisdictions fall within the same rank on our scale of restrictiveness, but it is less reasonable when there is little commonality among the approaches being used across the state. Of course, it should be emphasized that a comparison approach should only be used in combination with other less relativistic approaches so as not to allow a broadly practiced, but nevertheless inadequate, interpretation of the GMA to become an accepted standard of practice.

Relative Restrictiveness Across Development Regulation Elements

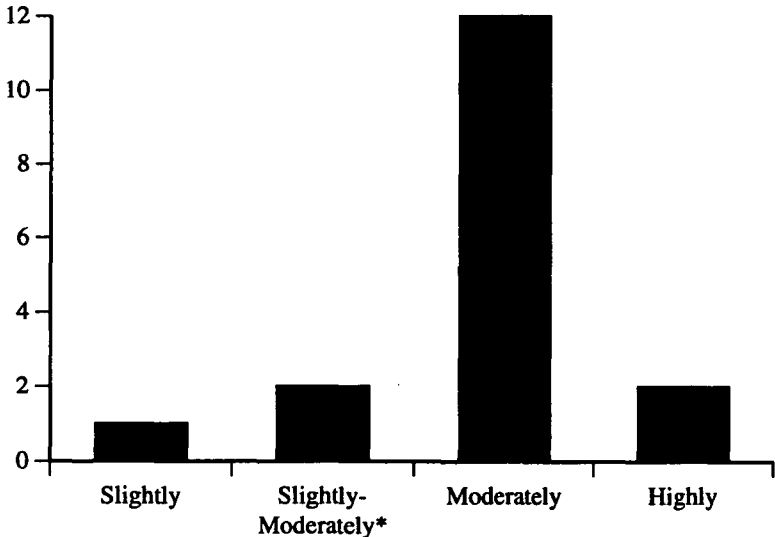


Figure 1. When compared, most jurisdictions tended to be moderately restrictive across the various elements of their development regulations.

*Slight and moderate elements were equal in frequency.

Using this methodology, we found that a significant portion of Washington's local jurisdictions should be suspected of having inadequate regulations. For example, according to Table 4, about half of the development standard sections in the wetlands ordinances were ranked as being moderately restrictive. The jurisdictions in this group can be considered to provide the typical level of restrictiveness in their development

standards. However, about one-quarter of the jurisdictions use less restrictive development standards than the norm. Consequently, these jurisdictions should be seen as having an inadequate element in their regulations because of this deviation from a norm that is shared by the majority of jurisdictions. Similar logic can be applied to Figure 1, which suggests that about ten percent of the regulations should be suspected of having regulations that on the whole provide inadequate protection.

Relative Restrictiveness of Development Regulation Elements			
	Slightly	Moderately	Highly
Wetlands			
Definition	25%	68%	7%
Allowed Activities without Permit	0%	75%	25%
Development Standards	24%	52%	24%
Aquifer Recharge Areas			
Definition	0%	75%	25%
Allowed Activities without Permit	0%	75%	25%
Development Standards	12%	88%	0%
Fish and Wildlife			
Definition	36%	50%	14%
Allowed Activities without Permit	0%	42%	57%
Development Standards	49%	51%	0%
Geologically Hazardous Areas			
Definition	28%	46%	26%
Allowed Activities without Permit	33%	33%	33%
Development Standards	61%	6%	33%

Table 4. The majority of cities and counties adopted development regulations which rated a medium level of restrictiveness, although many fall above or below this rank.

Potentially overly restrictive regulations also can be identified using this approach. Regulations that are more restrictive than necessary impair the achievement of other goals in the GMA, such as “[e]ncourag[ing] the availability of affordable housing . . . and allowing [a]pplications for both state and local government permits [to] be processed in a timely and fair manner to ensure predictability.”⁹⁶ When we applied the same approach used above to identify regulations that may be too restrictive, we found that one-third of the ordinances could be suspected of being too restrictive in at least one of their indi-

96. WASH. REV. CODE § 36.70A.020 (1992).

vidual elements and about five percent of the regulations could be suspected of being too restrictive on the whole. In general, these findings undermine arguments made by anti-environmental protection activists that the resource lands and critical area development regulations being adopted under the GMA are too restrictive. At least in relative terms, while a significant minority of the regulations may have at least one individual element that may be more restrictive than the norm, only about five percent of the regulations as a whole can be suspected of being more restrictive than those adopted by most jurisdictions.

VII. COMPARISONS TO WASHINGTON STATE GUIDELINES: THE *MINIMUM GUIDELINES* PROMULGATED BY DCD WERE FOLLOWED BY MANY BUT NOT ALL CITIES AND COUNTIES

One topic addressed by the *Minimum Guidelines* is the definition of natural resource lands and critical areas.⁹⁷ Those definitions help determine the areas designated as, and the areas subject to, resource lands and critical area development regulations. Many jurisdictions have followed the recommended definitions, but others have not. For example, as shown in Table 5, sixty-one percent of Washington's cities and counties use the definition for wetlands provided by the *Minimum Guidelines*,⁹⁸ while thirty-nine percent use either the Department of Ecology (DOE) Model Wetlands Ordinance definition,⁹⁹ the U.S. Army Corps of Engineers' definition,¹⁰⁰ their

97. WASH. ADMIN. CODE § 365-190-030(4), (15) (Supp. 1991).

98. *Id.*

99. The DOE definition provides:

"Wetlands", for the purposes of inventory, incentives, and nonregulatory programs, means those lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For the purposes of this definition, wetlands must have one or more of the following attributes: 1) At least periodically, the land supports predominantly hydrophytes; 2) The substrate is predominantly undrained hydric soil; and 3) The substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year.

WASHINGTON STATE DEP'T OF ECOLOGY, MODEL WETLANDS PROTECTION ORDINANCE § 2(ii) (Sept. 1990).

100. "Those areas that are inundated or saturated by ground or surface water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b) (1992).

own definition, or none at all.¹⁰¹

Conformance With Minimum Guidelines Definitions		
	Conforming	Non-Conforming
Wetlands	61%	39%
Aquifer Recharge	40%	60%
Fish and Wildlife	52%	48%
Frequently Flooded	100%	0%
Geologic Hazards	94%	6%
Agriculture	40%	60%
Forest	100%	0%
Mineral	100%	0%

Table 5. Many cities and counties followed the Minimum Guidelines' definition promulgated by the State Department of Community Development and many did not.

The *Minimum Guidelines* also suggest that cities and counties should consider using the methodology in the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands.¹⁰² This is the manual that technicians use in the field to delineate the exact boundaries of wetlands. Using a different manual can reduce the area of wetlands that are delineated and thus protected.¹⁰³ As shown in Figure 2, fifty-six percent of the cities and counties follow the *Minimum Guidelines*' advice, thirty-nine percent do not specify a manual, and five percent specify a federal manual from another year.

101. The definition in the *Minimum Guidelines* makes reference to artificial wetlands created to mitigate the conversion of wetlands. This reference is not made by the other definitions. WASH. ADMIN. CODE 365-190-030(22) (Supp. 1991).

102. The *Minimum Guidelines* provide:

Counties and cities should consider using the methodology in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, cooperatively produced by the United States Army Corps of Engineers, United States Environmental Protection Agency, United States Department of Agriculture Soil Conservation Service, and United States Fish and Wildlife Service, that was issued in January 1989, and regulatory guidance letter 90-7 issued by the United States Corps of Engineers on November 29, 1990, for regulatory delineations.

Id. § 365-190-080(1)(c).

103. In a personal, confidential interview, one city planner indicated that in his jurisdiction the decision of what manual to use would change the size of the area delineated as wetland by approximately 30 percent.

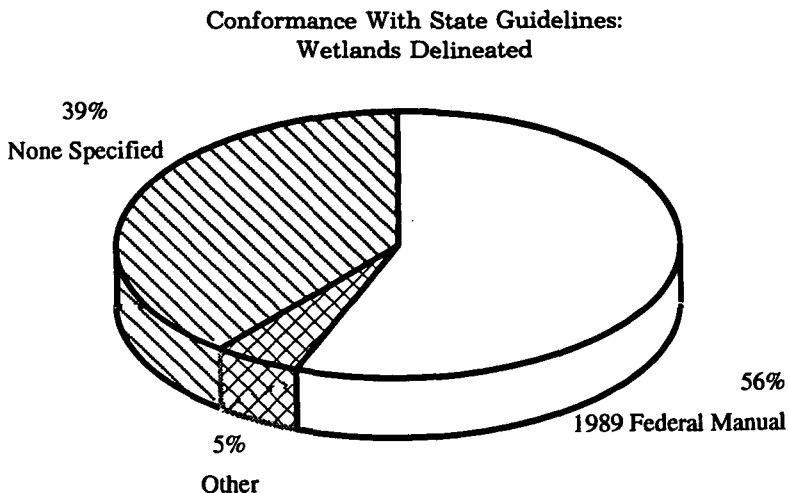


Figure 2. Fifty six percent of cities and counties followed DCD's advice to use the 1989 Federal Manual, thirty-nine percent did not specify any federal manual and five percent specified a federal manual from another year.

The *Minimum Guidelines* also require counties and cities that do not now rate wetlands to consider a rating system.¹⁰⁴ In developing wetland rating systems, the *Minimum Guidelines* state that counties and cities should consider the Washington State four-tier wetlands rating system and other factors.¹⁰⁵ As shown in Figure 3, thirty-nine percent of the jurisdictions adopted the four-tier rating system.

104. WASH. ADMIN. CODE § 365-190-080(1)(a) (Supp. 1991).

105. *Id.*

Conformance With State Guidelines: Wetlands Classification

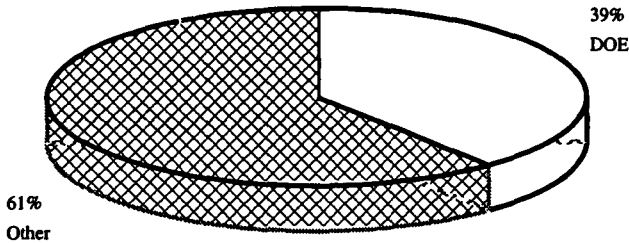


Figure 3. The Guidelines recommended using the Washington State 4-tier wetlands classification system found in the DOE Model Wetlands Regulation. Thirty-nine percent of local jurisdictions used that classification system, sixty-one percent did not.

There were also significant deviations from the recommendations of the Washington State Department of Wildlife (WDW) for fish and wildlife habitat conservation areas.¹⁰⁶ Only two of the eleven definitions currently being used for fish and wildlife habitat follow WDW's recommendation to include within those definitions areas having primary association with endangered, threatened, or otherwise important species. The WDW also prepared draft recommendations that one hundred fifty to two hundred foot buffers be provided on both sides of Class 1 and Class 2 streams.¹⁰⁷ Only three of the thirteen different sets of development standards being used conform to this recommendation.

Conformance with state guidelines can be used as another way to judge the adequacy of the local development regulations because the state guidelines represent a professional opinion of what should be done to protect critical areas and conserve resource lands. The significant discrepancies that exist between the guidelines and some local regulations should generate suspicion that some regulations do not actually fall within reasonable limits of local discretion.

Our results as to the number of jurisdictions conforming with state guidelines indicate that local governments do not necessarily follow state guidelines. This finding refutes the

106. Letter from Stephen Penland, Growth Management Program Manager, Washington Dep't of Wildlife, to Regional Habitat Program Managers (Apr. 8, 1992) (on file with author).

107. *Id.*

argument made by opponents of state standards that the guidelines will become de facto standards. Their argument is that because local governments will assume that they will be judged by the growth management hearings boards according to state guidelines, they will therefore conform with the guidelines to avoid having their local actions overturned by those boards. This argument was used by some of those who opposed provisions in the House version of the 1991 amendments to the GMA that would have required the state to set standards for local planning.¹⁰⁸

The evidence from our study suggests that it is time for the state to rely on more than guidelines to ensure that all local jurisdictions provide the level of protection and conservation required by the GMA. One possible solution is to have the state adopt mandatory standards rather than guidelines. If the standards were stated in performance terms, indicating the level of protection or conservation that should be achieved, but not how to achieve it, local governments would still have significant flexibility in determining the tactics they wish to employ for meeting the standards. For example, if the state adopted a nondegradation standard for surface water runoff discharged into wetlands, local governments would be free to determine whether they wished to use natural buffers, runoff diversions, or other approaches to meet the discharge limits.

Another possible solution is to increase the level of collaboration between state and local agencies in the preparation of local ordinances. If the state were to systematically and thoroughly review and comment on local draft ordinances and participate more fully in their preparation, greater compliance with state guidelines might be achieved. There would probably still be some local jurisdictions, however, that would refuse to adopt the approach recommended by state agencies. These jurisdictions may only respond to state standards backed by the threat of sanctions provided for in the GMA.¹⁰⁹

A third solution is to adopt financial incentives that encourage compliance with state guidelines. Economic development grants and infrastructure funds, for example, could be made available to jurisdictions that conform with state recommended practices on the grounds that growth should be

108. Personal conversation with Washington Department of Community Development staff.

109. WASH. REV. CODE § 36.70A.340 (1992).

encouraged in these areas because they are doing a better job of managing it.

VIII. COMPARISONS TO OTHER GUIDELINES: FOR THE MOST PART VERY FEW LOCAL REGULATIONS CONTAINED THE PROVISIONS RECOMMENDED BY OTHER STATES AND SOURCES

Although Washington State provided guidelines to local governments for classifying and designating resource lands and critical areas,¹¹⁰ it did not and was not required to provide guidelines for development regulations to protect or conserve them. Therefore, in our study, we collected standards and guidelines prepared by other states and standards and guidelines published in the professional literature to establish additional benchmarks for evaluating the local development regulations.¹¹¹

110. WASH. ADMIN. CODE ch. 365-190 (Supp. 1991).

111. For a compilation of methods of protecting and conserving various types of resource lands and critical areas, see CHARLES THUROW ET AL., PERFORMANCE CONTROLS FOR SENSITIVE LANDS, PLANNING ADVISORY REPORT NUMBER 307/308 (American Society of Planning Officials 1975). For methods of protecting wetland areas, see GA. ADMIN. CODE § 391-3-16.03 (1991); NORTHEASTERN ILLINOIS PLANNING COMM'N, MODEL STREAM AND WETLAND PROTECTION ORDINANCE (Northeastern Illinois Planning Comm'n 1988); STATE OF MAINE, DEP'T OF ENVIRONMENTAL PROTECTION, STATE OF MAINE GUIDELINES FOR MUNICIPAL SHORELAND ZONING REGULATIONS § 1000.06-096 (1990); DAVID G. BURKE ET AL., PROTECTING NONTIDAL WETLANDS, PLANNING ADVISORY SERVICE REPORT NUMBER 412/413 (American Planning Assoc. 1988). For a compilation of methods for protecting wildlife habitat, see MAINE DEP'T OF INLAND FISHERIES AND WILDLIFE, CONSERVATION OF INLAND FISHERIES AND WILDLIFE HABITAT (1990); DANIEL L. LEEDY ET AL., PLANNING FOR WILDLIFE IN CITIES AND SUBURBS, PLANNING ADVISORY SERVICE REPORT NUMBER 331 (American Society of Planning Officials 1978). For methods of protecting aquifer recharge areas, see GA. ADMIN. CODE § 391-3-16.02 (1991). For methods of protecting frequently flooded areas, see ARIZONA DEP'T OF WATER RESOURCES, MODEL FLOOD DAMAGE PREVENTION ORDINANCE (1989); ILLINOIS DEP'T OF TRANSPORTATION, DIVISION OF WATER RESOURCES, MODEL FLOOD PLAIN ORDINANCE (1990); OKLA. ADMIN. CODE § 785:55 (1992); WISCONSIN DEP'T OF NATURAL RESOURCES, MODEL FLOODPLAIN ZONING ORDINANCE (July 1991); JON A. KUSLER & THOMAS M. LEE, REGULATIONS FOR FLOOD PLAINS, PLANNING ADVISORY SERVICE REPORT NUMBER 277 (American Society of Planning Officials 1972). For methods of planning for geologically hazardous areas, see DUNCAN ERLEY & WILLIAM J. KOCKELMAN, REDUCING LANDSLIDE HAZARDS: A GUIDE FOR PLANNERS, PLANNING ADVISORY SERVICE REPORT NUMBER 359 (American Planning Assoc. 1981); MARTIN JAFFE, REDUCING EARTHQUAKE RISKS: A PLANNER'S GUIDE, PLANNING ADVISORY SERVICE REPORT NUMBER 364 (American Planning Assoc. 1981). For methods of conserving mineral resources areas, see W.P. ROGERS ET AL., GUIDELINES AND CRITERIA FOR IDENTIFICATION AND LAND USE CONTROLS OF GEOLOGICAL HAZARDS AND MINERAL RESOURCE AREAS, SPECIAL PUBLICATION NUMBER 6 (State of Colorado Geological Survey 1974); JOEL T. WERTH, SAND AND GRAVEL RESOURCES: PROTECTION,

An exhaustive inventory of guidelines used around the nation was not conducted. Instead, we used a telephone survey to identify a few sources that had adopted standards or guidelines for local government protection of each of the resource lands and critical areas addressed by the GMA.¹¹² The standards and guidelines collected in this manner may not be representative of the guidelines that exist in the nation as a whole. They are merely examples of what some states and the professional literature recommend local governments do to conserve and protect these areas. Altogether, thirty sets of standards or guidelines were collected. This collection was converted into checklists for use in determining whether the local development regulations that were examined for this study included the recommended provisions.¹¹³

For any given element in the development regulations, no more than five of the forty-two regulations matched the guidelines from the checklist. This was especially true for areas in which Washington's local governments have had less experience, namely areas with a critical recharging effect on aquifers used for potable water, geologically hazardous areas, fish and wildlife habitat, and mineral and forest resource lands. Two exceptions to this finding are wetlands and frequently flooded areas. Many local wetlands regulations have much in common with the out-of-state guidelines, perhaps because of the guidance provided by the Model Wetlands Ordinance.¹¹⁴ Also, the heightened concern for wetlands protection in recent years has

REGULATION AND RECLAMATION, PLANNING ADVISORY REPORT NUMBER 347 (American Planning Assoc. 1980). For methods of conserving agricultural lands, see OR. ADMIN. R. § 660-5 (1986); VA. CODE ANN. § 15.13.1-8 (Michie 1988); WIS. STAT. ANN. ch. 91 (1990); U.S. DEPT OF AGRICULTURE, SOIL CONSERVATION SERVICE, NATIONAL AGRICULTURE LAND EVALUATION AND SITE ASSESSMENT HANDBOOK (1983); WILLIAM TONER, SAVING FARMS AND FARMLANDS: A COMMUNITY GUIDE, PLANNING ADVISORY SERVICE REPORT NUMBER 333 (American Society of Planning Officials 1978). For methods of conserving forest resource lands, see CAL. CODE § 51100 (1983); OR. ADMIN. R. § 660-6-4 (1992); VA. CODE ANN. § 15.13.1-8 (Michie 1989); VERMONT DEP'T OF FORESTS, PARKS AND RECREATION AND THE UNIVERSITY OF VERMONT EXTENSION SERVICE, PLANNING FOR THE FUTURE FOREST: A SUPPLEMENT TO THE PLANNING MANUAL FOR VERMONT MUNICIPALITIES (1991).

112. *Id.*

113. See KELLY MCFALL & GARY PIVO, CRITICAL AREAS AND RESOURCE LANDS CHECKLISTS, GROWTH MANAGEMENT PLANNING AND RESOURCE CLEARINGHOUSE, UNIVERSITY OF WASHINGTON COLLEGE OF ARCHITECTURE AND URBAN PLANNING (1992).

114. WASHINGTON STATE DEPARTMENT OF ECOLOGY MODEL WETLANDS PROTECTION ORDINANCE (1990).

caused many jurisdictions to address this issue in more depth than other critical areas.

Regulations for frequently flooded areas, particularly development standards for such areas, have elements that are similar to those contained in the out-of-state guidelines. Again, as in the case of wetlands, this might be explained by the longer period of time local jurisdictions have been addressing the issue of flooding and by the work done by specific agencies charged with encouraging flood hazard mitigation.

Overall, these inconsistencies are not surprising because Washington has not focused on importing guidelines adopted by other states and disseminating them to local jurisdictions. This is unfortunate because even though our state would need to adapt many of the borrowed approaches to meet local conditions, those methods used across the country to protect critical areas and to conserve resource lands may have much to teach us in Washington.

Some differences between our state's approaches and those recommended elsewhere do reflect Washington's concern for its own unique conditions. For example, our approach to regulating development around geologic hazards differs from the California and Colorado models because Washington has somewhat different geologic formations and seismic risks. Still, other differences between the out-of-state guidelines and Washington's approaches provide examples of what could be done to establish a more complete program of protection and conservation in Washington State. For example, most local regulations in Washington only protect riparian areas as fish and wildlife habitat even though other important types of habitat exist. Guidelines from outside of Washington suggest that upland habitats,¹¹⁵ travel corridors, vegetated slopes, and big game winter ranges should also be protected. This represents a significant gap in Washington's program.

IX. CONCLUSION

The major points made in this Article can be summarized as follows:

(1) Several jurisdictions did not complete their regulations on time. As a result, resources are being harmed beyond the level envisioned by the GMA. This problem should be addressed by

115. See LEEDY ET AL., *supra* note 111.

requiring an interim mechanism, like a model state regulation or state review of local actions, until adequate local regulations are adopted.

(2) Some jurisdictions have not adopted regulations for certain critical areas and resource lands, claiming they do not exist in their jurisdiction. The requirement in the GMA to adopt regulations that conserve resource lands and protect critical areas does not protect all of the resource lands and critical areas of the state.¹¹⁶ Local plans will need to address the unprotected areas, such as noncommercial forests, as part of their comprehensive plans if they are going to fully achieve the goals of the GMA.

(3) Several jurisdictions are using SEPA in lieu of adopting development regulations. While SEPA is an attractive alternative for some places, it is not well-suited to meet GMA requirements.

(4) There is a great deal of variety among the development regulations. While this reflects the diversity of conditions that exist in Washington State, it also indicates uncertainty about how to proceed. Variety is probably creating wasteful confusion and costs and some of the approaches being used are probably inadequate to protect or conserve the resources.

(5) There is a wide range in the restrictiveness of the regulations that have been adopted. Those at either end of the range should be suspected of being too weak or too restrictive.

(6) Many jurisdictions are following Washington State's *Minimum Guidelines*, but others are not. This is further evidence that some jurisdictions are not adopting adequate development regulations. It also suggests that guidelines are not a sufficient approach for ensuring local compliance with desired standards.

(7) Few jurisdictions are following standards and guidelines found in other states and in the professional literature. This indicates a concern for unique local conditions, but it also indicates deficiencies in the approaches being taken by Washington's local governments.

Despite these findings, it should be said that many jurisdictions are making a good faith effort to advance the goals of the GMA. But, in spite of their efforts, some jurisdictions appear to be veering off an adequate course. To the extent that many critical areas and natural resources are part of whole systems that do not respect artificial jurisdictional

116. WASH. REV. CODE § 36.70A.060 (1992).

boundaries, the good efforts being made by some jurisdictions to protect these systems may be undermined by the failures of others.

Ultimately, this work has left me with a deep sense of concern over how well the GMA is working. At least within the subjects discussed here, a significant minority of local jurisdictions are probably responding to the GMA in ways that will not achieve its goals. As a result, many resource lands and critical areas that are intended for conservation or protection will continue to be threatened and harmed.

The major reason why some jurisdictions have not and should not be expected to comply with the GMA is that its *laissez-faire* design does not go far enough to change the basic way local land use decisions are made. The GMA is the product of a statewide legislative decision to manage growth for the good of the state as a whole. However, local land use politics seldom reflect the statewide balance of interests contained in the GMA. Unless the statewide point of view is required to be considered by local officials, they will continue to respond to locally dominant interests that frequently lean farther toward either environmental preservation or unfettered development.

Other states' programs typically include a stronger role for the state because of the recognized need to balance state and local interests at the local level. This balance is achieved by requiring consistency between state and local policies and by having a systematic process for checking consistency. In Washington, the state has articulated few specific rules to interpret the GMA. State agencies have the option of commenting or not commenting on local plans,¹¹⁷ and local interests are heavily relied on to identify inadequate programs and bring them before the growth management hearings boards. Furthermore, appeals that can be made to the boards by the state are limited and the subject of state discretion on whether they will be made,¹¹⁸ and there is a presumption of validity for local comprehensive plans and development regulations.¹¹⁹ All of these factors limit the extent to which local jurisdictions are required to consider non-local interests in local planning. In the simplest of terms, the GMA articulates goals the state wishes to see implemented by local governments. However,

117. *Id.* § 36.70A.106(1).

118. *Id.*

119. *Id.* § 36.70A.310.

the state has largely turned the responsibility for achieving these goals over to local agencies without fundamentally altering local planning politics. As a result, when local agencies do not wish to achieve state goals, there is little pressure on them to do otherwise.

One of the major flaws in the Washington system is that it makes it very difficult for those who would advocate statewide concerns before local governments to know what is occurring at the local level. One of the most unique aspects of the Washington system, which sets it apart from most others, is the lack of a requirement for systematic state review and comment on local plans and regulations. Without such review, the burden falls on local interests to find flaws and then appeal them to the hearings boards. This is simply beyond the capacity of many organizations at the local level, if they exist at all. The GMA supplemented the court system for enforcing state law with hearings boards,¹²⁰ but it neither provides an adequate intelligence system for gathering information on what is occurring at the local level, nor does it provide for bringing inadequate local actions before the boards. This omission hinders the effectiveness of the hearings boards, which is one of the most important elements in the GMA for ensuring that local agencies implement local policies that are consistent with statewide goals and requirements.

What must be done then to overcome the tendency for some local agencies to make plans that are inconsistent with state policies? First, state agencies should use the authority provided to them in the GMA¹²¹ to systematically and publicly comment on draft local plans and development regulations. Second, the state should fully fund state technical assistance and publish more models of what local plans and regulations should contain in order to be consistent with state policies. Third, state agencies should work cooperatively with other governmental agencies and experts to evaluate the adequacy of the approaches being taken to conform with the GMA and to identify inadequate or unnecessarily restrictive approaches. Fourth, these inadequate or unnecessarily restrictive approaches should be appealed by the governor to the growth management hearings boards, who should find those jurisdictions using these approaches as not in compliance with the

120. *Id.* § 36.70A.320.

121. *Id.* §§ 36.70A.250 *et seq.*

GMA. The hearings boards should then require immediate compliance with the GMA through the emergency adoption of a state model program or another jurisdiction's regulations that do comply with the GMA until such time as an adequate alternative can be developed locally. Finally, the effectiveness of the local programs should be carefully monitored to ensure that they are achieving state goals and to ensure that the models and approaches that are considered adequate are in fact up to the task of successfully managing growth.

These and similar strategies are needed to ensure that all local jurisdictions adopt development regulations and take other actions that are consistent with the statewide goals and requirements contained in the GMA. The evidence in this Article suggests that without these efforts, many jurisdictions will continue to stray from the flock that is attempting in good faith to implement the GMA. If these efforts are not undertaken, then the state may be no better off in many places than it was before the GMA was adopted, and the best efforts of many jurisdictions will be undermined by the poor efforts of their neighbors.