Washington’s Way: Dispersed Enforcement of Growth Management Controls and the Crucial Role of NGOs

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[W]hen people were on the Oregon Trail, there was a sign in Oregon Cities: “Oregon is the End of the Oregon Trail,” and all the people who could read stopped in Oregon and all who couldn’t went to Washington.1

I. INTRODUCTION

While growth management laws might not be pervasive, many states have some form of legislative scheme to cope with the governmental and environmental impacts of urban sprawl,2 a global phenomenon that has come to define twenty-first century cities.3 These statewide

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3. Edward H. Ziegler, China’s Cities, Globalization, and Sustainable Development: Comparative Thoughts on Urban Planning, Energy, and Environmental Policy, 5 WASH. U. GLOBAL STUDIES L. REV. 296, 304 (2006). Most major metropolitan areas throughout the industrialized world experienced some degree of outward sprawling during the latter half of the twentieth century. In the United States, however, the densities in these sprawling development areas have generally been so
strategies to limit the hyper-growth of cities vary in substance\textsuperscript{4} and have had varying degrees of success. Large urban areas continue to struggle to prevent city populations from spilling into open space areas on their periphery and swallowing open space and farm land—both of which may have disastrous consequences for the environment, energy consumption, and the quality of urban life.\textsuperscript{5}

Arguably, two of the most notable growth management laws created to address the problem of urban sprawl are those of Oregon and Washington. These two states have enacted contrasting statutory growth management frameworks, even though their environments are quite similar in terms of topography and ecology.\textsuperscript{6} Both Oregon and Washington require certain counties and cities to engage in comprehensive planning; this planning is meant to encourage development within designated urban growth areas and to protect farmland, forests, and critical environmental areas.\textsuperscript{7} However, Washington politicians created a dispersed/“bottom up” approach to growth management as opposed to Oregon’s hallmark strategy of a centralized/“top-down” approach.\textsuperscript{8} More importantly, Oregon enacted a centralized, statewide plan with legislatively mandated enforcement from a single government entity, while Washington enacted a scheme in which enforcement of the Growth Management Act (“GMA”) was left to non-governmental organizations (“NGOs”) acting at the local level.

Moreover, Oregon requires all counties and cities to submit comprehensive plans to a state agency for “acknowledgment” before enacting corresponding development regulations,\textsuperscript{9} while Washington’s GMA requires only certain counties and cities to complete comprehensive plans.


\textsuperscript{5} Porter, supra note 2, at 496–97.

\textsuperscript{6} McGeveran, infra note 66, at 444–45; WASH. REV. CODE § 36.70A (2006); OR. REV. STAT. 197 (2005).

\textsuperscript{7} WASH. REV. CODE § 36.70A.020 (2006); OR. REV. STAT. 197.010 (2005).

\textsuperscript{8} The programs are typically referred to by the community of persons working in the field as “top down” for Oregon and “bottom up” for Washington. This Article describes them as “centralized” and “dispersed” in an effort to be more accurate and less value-laden.

\textsuperscript{9} Hong N. Huynh, Administrative Forces in Oregon’s Land Use Planning and Washington Growth Management Act, 12 J. ENVTL. L. & LITG. 115, 118–20 (1997).
before they may enact necessary development regulations.\textsuperscript{10} The approval required for these plans and regulations is important because they are presumed valid until a constituent of the state petitions a state hearings board and the board rules against the local government.\textsuperscript{11} Despite these contrasting enforcement methods, both the Washington and Oregon acts share similar goals of protecting open space, critical areas, and farm lands, as well as encouraging vibrant and more densely populated urban areas.\textsuperscript{12} Thus, regardless of their differences, the Washington and Oregon schemes place the two states at the forefront of growth management in the United States,\textsuperscript{13} making a discussion of their contrasts all the more important.

Though there is a valuable and extensive collection of literature on anti-sprawl efforts in both states, this Article examines Washington’s Growth Management Act and the critical role that NGOs play in supporting the GMA. Specifically, this Article looks at Washington’s GMA from three perspectives—legal, historical, and empirical—and proposes that NGOs are vital to the GMA’s enforcement. Because NGOs are so critical to the enforcement of the GMA, the question of how the courts interpret the scope of authority of growth management hearing boards when deciding growth management cases becomes very important. A decrease in the authority of the hearing boards would restrict the NGO’s ability to act as the trustees of the GMA and enforce the GMA’s goals and requirements. Legal, historical, and empirical analyses are also central to an understanding of dispersed versus centralized growth management laws and the different enforcement powers given to GMA organizations.

Part II of this Article outlines Washington’s approach to growth management, describing the differences between dispersed and centralized approaches to the enforcement of growth management laws, the structure and legislative background of Washington’s GMA, and the organizations involved in enforcing the GMA. Part III provides an empirical analysis of the enforcement of the GMA over the last ten years, examining particular cases involving developers and the NGO Futurewise. Finally, Part IV concludes with a brief summary.

\textsuperscript{10} WASH. REV. CODE § 36.70A.040 (2006).
\textsuperscript{11} Settle & Gavigan, supra note 4, at 901.
\textsuperscript{12} WASH. REV. CODE § 36.70A.020 (2006); OR. REV. STAT. 197.010 (2005).
II. WASHINGTON’S DISPERSED APPROACH

Although this Article’s primary audience is policy makers and lawyers who are familiar with the GMA, a brief description of Washington’s law, relevant institutions, and the general theory behind the review, approval, and enforcement mechanisms of the GMA is necessary to aid both the primary audience and the general reader. This general information provides the framework within which we can analyze whether the current GMA structure will ensure local legislative actions are compliant with the GMA. When discussing the general theories and institutions of the GMA, it is first important to define the terms “dispersed” and “centralized.” Once these general definitions are understood, it is then necessary to specifically describe Washington’s GMA structure, legislative history, and the organizations involved in its enforcement.

A. Dispersed v. Centralized Defined

To understand the success of public policy groups in enforcing the GMA’s goals and requirements, it is first helpful to understand precisely how dispersed and centralized approaches differ, and how these differences impact the enforcement of the GMA. In structuring a state-wide growth management law, there are nearly an infinite number of possibilities along the continuum of absolute state control to absolute local control. Consider the interplay of the law’s goals, requirements, state agency rulemaking authority, the ability to appeal to administrative boards or state courts, deference given to local decisions, and various alternatives that could be dreamed up for different elements. This Article will begin with the absolutes. For the purposes of this Article, “absolute centralized” means a growth management approach where the state creates the local comprehensive plans and dictates what development regulations local governments shall adopt. By contrast, “absolute dispersed” refers to an approach where the state establishes broad goals, but local governments create their own comprehensive plans and development regulations with state guidance but no state oversight. Washington’s

GMA structure is characterized in this Article as dispersed because that characterization is descriptive of how the GMA is enforced.

B. Washington’s GMA Structure

In Washington, the duty to ensure that local legislative actions are compliant with the GMA falls upon members of the public who can establish standing as petitioners to quasi-adjudicative agencies called “growth management hearings boards.” Until a local legislative action is challenged through one of these hearing boards by a constituent, the local action is presumed compliant. Private citizens or local governments have a sixty-day window to bring any such challenge before a hearings board. Thereafter, the board must set a hearing date within ten days and make a decision regarding whether or not the local action complies with the GMA within 180 days of receiving a petition, subject to extensions. Section 36.70A.280(2) of the Washington Administrative Procedure Act (“APA”) defines the class of people who have standing to challenge local government decisions under the GMA. The definition is broad and includes:

(a) The state, or a county or city that plans under [the GMA];

(b) A person who has participated orally or in writing before the county or city regarding the matter on which a review is requested;

(c) A person who is certified by the governor within sixty days of filing the request with the board; or

(d) A person qualified pursuant to RCW 34.05.530 [standing under Washington’s Administrative Procedure Act].

Most petitioners use subsection (b) of the statute to gain standing based on participation in the matter for which review is sought. Public interest organizations also gain standing through this provision, either through their local members who have participated in council meetings and public hearings or through their letters and comments on comprehensive plans and amendments to local governments.

16. Id. § 36.70A.320.
17. Id. § 36.70A.290(2).
18. Id. § 36.70A.300(2).
19. Compare WASH. REV. CODE § 36.70A.280(2) with WASH. REV. CODE § 34.05.530 (2006).
Before the hearings boards, the burden is on the petitioner to persuade the board that a local legislative action does not comply with the GMA.20 In reviewing local actions, hearings boards apply the "clearly erroneous" standard of review.21 If a petitioner establishes standing to bring a challenge before the board but receives an adverse decision, the petitioner can appeal the board's decision to the Washington State Superior Court at the county level within thirty days of the board's final order.22

In addition to orders from the hearings board, compliance with the GMA is assured through gubernatorial penalties.23 If a hearings board recommends a penalty be imposed,24 the governor may do the following:

(1) [D]irect the director of the office of financial management to revise allotments in appropriation levels;

(2) [D]irect the state treasurer to withhold the portion of revenues to which the county or city is entitled under one or more of the following: the motor vehicle fuel tax . . . ; the transportation improvement account . . . ; the urban arterial trust account . . . ; the sales and use tax . . . ; the liquor profit tax . . . ; and the liquor excise tax . . . ; or

(3) [D]irect the secretary of state to] temporarily rescind the county or city's authority to collect the real estate excise tax . . . .25

In practice, gubernatorial penalties have been few and far between; the hearings board orders apparently have been sufficient. In turn, the orders are generally enforced by organizations and public interest groups associated with the GMA.

C. Legislative History and Intent

1. Legislative History

An examination of the GMA's legislative history is critical to understanding the degree of dispersion of the GMA, as well as the absence of any official executive enforcement agency ordained by the GMA. Ultimately, the legislative history sheds some light on whether the GMA was meant to be dispersed or centralized in nature. The GMA's legisla-

21. Id. § 36.70A.320(3).
22. Id. § 36.70A.300(5).
23. Id. § 36.70A.340.
24. Id. § 36.70A.330(3).
25. Id. § 36.70A.340.
tive history began with adoption of Washington's first comprehensive planning law in 1959, which provided a planning structure that counties could opt into. As to the law's actual comprehensiveness, its only requirements were that counties consider land use and transportation circulation elements. The law left as optional considerations such as conservation, solar energy, transportation, transit, public buildings, housing, redevelopment, and capital improvement programs. Few counties adopted such plans.

Though Washington adopted its first planning law in 1959, it was Oregon that became the model growth management state when it adopted its growth management legislation in 1973. Washington's first attempt at mandatory county and city comprehensive planning on par with Oregon came the following year in 1974. Though Washington Governor Dan Evans had previously pushed through two significant state environmental laws in the form of the State Environmental Protection Act and the Shoreline Management Act, this attempt at statewide growth management failed in the wake of Oregon's law.

The next attempt at growth management legislation did not come until 1989. Joe King, then Speaker of the Washington State House of Representatives, made his first effort at passing growth management legislation by stalling the passage of a gas tax bill until his growth management bill was also passed. Because King's bill was new and not well-

27. Id.
28. Id. §§ 36.70.330–340.
31. Joe Haussler, a conservative House Representative and Chair of the Local Government Committee, proposed House Bill 168 in 1974; it was modeled after Oregon's law but with less state control and more local control. The legislation went nowhere for the next two years and was reintroduced as House Bill 65 in 1977 to no avail. Interview by Rita R. Robison with Steve Ludin, senior counsel to Wash. State House of Representatives (retired) (July 19, 2005), available at http://www.secstate.wa.gov/oralhistory/pdf/OH816.pdf.
32. An anecdote of fame is that of Joe King, Speaker of the House for Washington State. Tom Campbell, who was King's senior executive assistant from 1987 to 1993 and who studied city planning at the Massachusetts Institute of Technology, tells the story:

The speaker and I were in a traffic jam on I-405 one day and we were under a significant amount of pressure by a broad coalition of labor and business interests to pass the gas tax at that time. There was a significant interest in putting more money into roads. The Speaker, Joe King, leans to me and says, "Look at those apartment buildings going up, who's responsible for those?" I said, "Well, funny you should ask because there is nobody who is centrally or even regionally responsible for this and that has any authority. Essentially, Mr. Speaker, there is no accountability for growth, or land use and therefore our transportation dollars. Well, there's no way to make our transportation dollars effi-
debated, a Growth Strategies Commission was created to analyze the issue and recommend legislation. It was not long after this first attempt by King that the 1990 legislative session passed the first components of the Growth Management Act.  

The 1990 GMA required certain local governments to do the following: (1) enact comprehensive development plans; (2) set urban growth areas; (3) consider certain elements when planning including land use, housing, capital facilities, utilities, rural areas, transportation, economic development, and parks; (4) adopt development restrictions; and (5) establish concurrency requirements for new developments. It also created a legal framework for public participation and coordination between neighboring jurisdictions. Most of the law only applied to the largest, fastest growing counties and their cities, leaving smaller counties the choice of whether to comply. Although the law was a step in the right direction, it failed to create any oversight for interpretation, rule-making, arbitration, or adjudication, and it also failed to establish penalties for non-compliance.

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34. Id. § 36.70A.040.
35. Id. § 36.70A.110.
36. Id. § 36.70A.070.
37. Id. § 36.70A.070(6)(b).
38. Id. §§ 36.70A.035, .100.
39. Id. § 36.70A.040(1).
40. One of the reasons that the 1990 GMA lacked any hearings boards or state oversight requirements might be Representative Busse Nutley, who stated: The growth boards were not part of the original legislation and in part because of me. It was this local governance piece, the bottom-up approach and I really felt that tying that to any proposal that was out there for what the state’s role was to be, was still too strong and wasn’t going to work politically. After this session I ran for county commissioner in Clark County and was elected. So, I was done with the legislation. The following year they went back and put the growth hearings boards together . . . . [A]gain I was opposed to having the state’s role very strong at all.
The legislature filled this enforcement gap in the 1991 legislative session but ultimately left enforcement to local control. The 1991 GMA enactment (1) established three regional growth management hearings boards to hear petitions from citizens contesting a local legislative action as violating the GMA; (2) established the deference owed to local decisions by the hearings boards; (3) established penalties for non-compliance; (4) required local governments to site essential public facilities; (5) required certain counties to establish county-wide planning policies to implement comprehensive plans; (6) allowed new, fully contained communities and master planned resorts outside of urban growth areas ("UGAs"); (7) established materials and a curriculum for local governments on how not to unconstitutionally take private property; (8) extended compliance dates; and (9) created a pilot program administered by the Washington State Department of Community Trade and Economic Development ("CTED") with the goal of streamlining environmental review. Unfortunately, the 1991 enactment did not provide for a central, state-funded agency to enforce the GMA or for compliance oversight. Consequently, dispersion remained the abiding method of growth management in Washington.

2. Legislative Intent

In analyzing to what degree the GMA is dispersed or centralized, it is also important to determine the legislative intent behind the GMA’s

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41. Because the 1991 session expired without any growth management legislation enacted, Governor Booth Gardner demanded that the House and Senate work out the final details in a special "Five Corners Committee." At the same time, a group of local governments, developers, and realtors drafted another version, which could be aptly described as "GMA-light." Senate Majority leader Jeannette Hayner rejected the developer group's proposal and pushed through the Five Corners' negotiated version, thus concluding the second enactment. For a good procedural history of the 1991 GMA legislation, see Settle & Gavigan, supra note 4, at 892-96; see also Interview by Rita R. Rohison with Joe King, Speaker of the Wash. House of Representatives, 1986-92 (Aug. 3, 2005), available at http://www.secstate.wa.gov/oralHistory/pdf/OH811.pdf.

43. Id. §§ 36.70A.320-330.
44. Id. § 36.70A.340.
45. Id. § 36.70A.200.
46. Id. § 36.70A.210.
47. Id. §§ 36.70A.350-360.
48. Id. § 36.70A.370.
49. Id. § 36.70A.380.
50. Id. § 36.70A.385.
creation. This intent can be seen in the motives that drove the creation of the GMA, including the roles of the boards and CTED. Legislative intent also plays a role in a discussion of the importance of the distinction between dispersed and centralized growth management schemes.

(a) Legislative Motives Behind Dispersed vs. Centralized

No adequate record exists of the thought processes underlying the 1990 and 1991 GMA enactments. The reasons for the creation of the dispersed approach in the establishment of the three hearings boards, the presumption of validity of local legislative actions, the burden of proof, and the standard of review were instead discerned largely from newspaper articles, institutional histories, and recorded interviews of the key players during the two enactments.

The decision to adopt a dispersed approach to growth management was made to ensure that comprehensive plans complied with statewide goals and requirements, and that decisions did not occur within a vacuum. Though Oregon’s law served as a model for Washington, many legislators set out to create a system that was completely opposite.  

51. Whatever the merits of the perception, those involved in the GMA creation believed there were differences between Washington and Oregon which necessitated a tailoring of growth management legislation to Washington state. As Michael McCormick stated:

I’d heard Joe King say if it worked in Oregon it won’t work in Washington. . . . We adamantly said, “We’re very different from Oregon, this isn’t Oregon, this is Washington.” In fact I had a joke that I told over and over and over again and that was about why one state was different than the other. And my joke was that when people were on the Oregon Trail there was a sign in Oregon cities: “Oregon is the End of the Oregon Trail,” and all the people who could read stopped in Oregon and all who couldn’t went to Washington [laughter]. A lot of people found it was humorous, but there really were some other fundamental political differences in the two states. Washington has a very populist tradition, Oregon doesn’t. Oregon was settled by people that were landowners, it was concentrated in the Willamette Valley. That’s where the political power was until very recently. Washington was very different. Washington was populated by people that built railroads, that worked in the forest, that went to Alaska, and there was a strong populist tradition which you can see reflected in our constitution. State power is really diffused and that was consciously done in 1889 by the drafters of the state constitution because they were afraid of a concentration of power, and the concentration they were afraid of was the railroads. And there was some long history, the Wobblies, the battle in Everett—we politically are very different with a different history.

Interview by Diane Wiatr with Michael J. McCormick, former CTED assistant director, 1969–94 (July 18, 2005), available at http://www.secstate.wa.gov/oralhistory/pdf/OH864.pdf. This was the logic floating in the legislative halls in 1990 and 1991. Perhaps this logic was a façade for other political considerations, such as providing consolations to the development community, but several of the interviews with individuals involved with the CTED express this same reasoning for the dispersed approach.
Several factors contributed to the decisions to adopt a structure different from that of Oregon. 52

First, an environmental coalition sponsored a statewide initiative in the fall of 1990 to replace the first GMA enactment. 53 This initiative was intended to provide a strong, centralized enforcement approach similar to Oregon’s law and would require all counties and cities to engage in comprehensive planning and submit their plans to a state agency for approval. 54 Although the general public favored managing growth, developers and legislators successfully fended off this new growth management initiative. 55 The coalition promised not to run the initiative in the fall if the legislature passed a strong act. 56 This provided the Legislature with an incentive to pass legislation as strong as politically possible.

In reaction to I-547 being put to the fall ballot, legislators, local governments, and businesses swung behind the legislators’ promises for stronger growth management legislation. 57 On September 28, 1990, the Four Corners Agreement was signed by House Speaker Joe King, House Minority Leader Clyde Ballard, Senate Majority Leader Jeannette Hayner, and Senate Minority Leader Larry Vognid, establishing an agreement with voters that the Legislature would revisit the GMA’s shortcomings. 58 Ultimately, I-547 was defeated by a three-to-one margin. 59 Despite its failure, I-547 had two beneficial effects for advocates of growth management. The first was to pressure the legislature to adopt significant legislation in 1990; the second was to force the legislative leaders to sign the Four Corners Agreement.

52. Furthermore, no burden of proof is assigned in the administrative proceeding of approving comprehensive plans in Oregon. OR. REV. STAT. § 197.350(3) (2005). While the Land Use Board of Appeals hears cases regarding moratoriums, all other litigation related to compliance with comprehensive planning is channeled through the Oregon Land Conservation and Development Commission (“LCDC”) and is then appealed through the state court system. OR. REV. STAT. § 197.505–540 (2005).


54. Id. The coalition’s Initiative 547 would have created a state commission to review the local legislative action, providing little deference to local decisions and creating a much stricter concurrency program. Id.

55. Id.

56. Id.

57. Id.

58. Id.

Second, Washington had already passed strong centralized environmental legislation with little deference to local decisions in the Shoreline Management Act. The Department of Ecology’s authority under the Shoreline Management Act is nearly the same as the Oregon Land Conservation and Development Commission’s (“LCDC”) authority. Thus, from a political context, the fact that the LCDC’s function was already being performed in Washington contributed to a loss of political momentum for a centralized approach to growth management.

Finally, although Republicans in control of the Senate felt political pressure from suburban constituents to enact a growth management law, they were not about to abandon their political base of developers and businesses. Businesses and developers wanted to keep control of


62. There is a historical difference between land use regulation, which dates to the 1910s, and waterway regulation, which dates to English common law. Land use and real estate were regulated at the local level with minimal state interference; shorelines and waterways have always been regulated by the state. Changing the status quo often faces stiff resistance.


64. The business community believed the semantics of "bottom-up" worked in their favor. Reflecting on Initiative 547 in 1990, Joe Tovar said, “the leading opposition to [I-547] was from the building community, who were scared to death of an even more directly centralized system than the Growth Management Act.” Interview by Diane Wiatr with Joe Tovar, president of Wash. City Planning Directors (Jul. 17, 2005), available at http://www.seccstate.wa.gov/oralhistory/pdf/OH833.pdf;
growth management for several reasons, having spent much of the prior seventy years working with local governments and establishing political relationships as land use regulations were applied. Developers typically have much more control over their fate when land use decisions are made by county and city councils rather than by a state agency. Dealing with an apolitical, state administrative board would have been a major setback for business as usual.\textsuperscript{65} This desire for control by developers was another factor that supported the adoption of a more dispersed growth management scheme.

Although these circumstances certainly frame the legislature’s choice of a dispersed approach, their underpinnings are not entirely logical. For example, whether Oregon is so different from Washington that an opposite compliance mechanism is necessary is a questionable assertion. The states have a number of things in common, such as the east-west geographical divide created by the Cascade Mountains,\textsuperscript{66} and the fact that populations in both states live primarily on the west side.\textsuperscript{67} Moreover, the states’ politics are similar with liberal cities and conservative rural areas at about the same ratios.\textsuperscript{68} Both states rely principally upon hydroelectric energy\textsuperscript{69} and the states’ economies share several similarities because both are focused on technology, international ports, and


\textsuperscript{65} The compromise for a dispersed approach with judicial oversight has not always gone as planned. Besides control over local decisions, what developers really desire is certainty. By relying on a quasi-judicial system instead of state administrative approval, the petition and appeals system prolongs local land use decisions, putting into jeopardy developers’ pro formas. One example is Snoqualmie Ridge, Weyerhaeuser’s master-planned community which was annexed by the City of Snoqualmie. The project incurred significant delays due to legal haranguing from 1991 to 1997, with two decisions before the state supreme court. Ultimately, Weyerhaeuser lost $65 million because of litigation of the project before the growth management hearings boards. Interview with Pete Lymberis, Project Engineer for Quadrant Homes, Vice President of the Snoqualmie Ridge Residential Owners Ass’n Board of Directors (April 20, 2006). \textit{See also} Friends of Snoqualmie Valley v. King County Boundary Bd. Review, 118 Wash. 2d, 488, 825 P.2d 300 (1992); Twin Falls v. Snoqualmie County, Final Dec. & Order, GMHB No. 93-3-0003 (Sept. 7, 1993); King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 91 Wash. App. 1, 951 P.2d 1151 (1998), \textit{rev’d by} 138 Wash. 2d 161, 979 P.2d 374 (1999); Quadrant Corp. v. State Growth Mgmt. Hearings Bd., 119 Wash. App. 562, 572, 81 P.3d 918 (2003), \textit{rev’d in part by} 154 Wash. 2d 224, 235–38, 110 P.3d 1132 (2005).

\textsuperscript{66} \textsc{William A. McGeveran Jr.}, \textsc{The World Almanac and Book of Facts 2006} 444–45, 450 (2006).

\textsuperscript{67} \textit{id.}

\textsuperscript{68} \textit{id.}

\textsuperscript{69} \textit{id.}
agriculture. In fact, one could make the case that Washington should be better suited politically for stronger growth management legislation than Oregon considering its greater problems of sprawl, congestion, and water management.

But whatever the case, the semantics of distinguishing a state as being different from its neighboring state has great political benefits. Thus, when the legislature adopts substantially similar legislation to a neighboring state's, it may be necessary to make political concessions by changing the language of the law. To those adopting this philosophy, the failure of the environmental coalitions' initiative gave credence to this rhetoric by proving that Washingtonians did not want Oregon's centralized approach. With a Republican-controlled Senate, this was the prevailing philosophy during the 1991 legislative session.

i. The Number of Boards

The number of hearings boards is an important aspect of the dispersed strategy. While the source of the idea for three regional based hearings boards is murky, it is clear that the Legislature was motivated by geography, politics, and allowing regional diversity in GMA interpretation. As Tom Campbell, senior executive assistant of policy for Joe King, Speaker of the Washington House of Representatives, stated:

[It] was the politics; the difference between Western Washington or generally the Puget Sound region and Eastern Washington . . . . Just

70. Id.

71. There are several stories as to who proposed having three regional hearings boards instead of one. As remembered by Lucy Steers, the Land Use Section of the Washington State Bar Association proposed the three regional hearings during the 1991 legislative session. Interview by Diane Wiatr with Lucy Steers, president of League of Women Voters of Seattle, 1987–97, member of the Growth Strategies Comm'n, and founding board member of Futurewise (Aug. 11, 2005), available at http://www.secstate.wa.gov/oralhistory/pdf/OH827.pdf. Representative Wayne Ehlers provided another explanation, believing that he himself came up with the idea as a way of balancing Republican desire for no hearings boards and Democrat desire for one, statewide board. Interview by Diane Wiatr with Wayne Ehlers, director of legislative & federal relations for the Office of the Governor, 1990-92 (Aug. 19, 2005), available at http://www.secstate.wa.gov/oralHistory/pdf/OH820.pdf. Joe King provided a third explanation:

We set out to have two hearing boards rather than three and Senator Pat McMullen, a good friend of mine . . . , who lived up in Sedro-Wooley proposed a third one. He wanted to have one for Puget Sound, one for the rest of west of the Cascades, and one east of the Cascades. I really think he did it because he had a friend of his that he wanted to get appointed to the growth management hearings boards. And I think, if I remember the story right, he succeeded in getting the hearings board set up for his area, but did not succeed in getting his friend appointed.

politically, it started to look like an Oregon board if there was one . . . . So we had to make it as politically palatable as possible and that's why we created the three boards.  

Thus, the issue of three boards versus one board was closely connected to the issue of a "bottom-up"/dispersed approach versus a "top-down"/centralized approach, and it revolved not so much around the merits of the different approaches, but instead around semantics and differentiation from Oregon. This is not to say the merits or benefits of the chosen approach were not of concern during the 1991 GMA enactment. The proponents of three boards argued that regional decisions would be good for growth management because decisions would reflect local circumstances. Proponents also did not want urban counties dictating policies to rural counties. But ultimately, making the Washington approach appear different from that of Oregon was significant and creating multiple regional boards was a substantial part of that.

Though important GMA framers were concerned that the three hearings boards would lead to inconsistent decisions, regionalism, and reduction of authority, they also recognized the advantages. One of the greatest strengths of multiple boards existed in having board members who understood local politics and who could provide "sensitivity to the

73. Interview by Diane Wiatr with Michael J. McCormick, supra note 55.
74. Charles Howard stated, “I think that was a good thing that happened because if it had just one, Puget Sound would have tended to dominate and then the rest of the areas would have probably felt a little bit more left out.” Interview by Diane Wiatr with Charles Howard, director of strategic planning & programming of the Wash. State Dep’t of Transp., 1988–04 (Aug. 12, 2005), available at http://www.secstate.wa.gov/oralhistory/pdf/OH830.pdf.
local point of view, but then could also be looking at case law over time.” The fact that petitioners could appeal adverse board decisions to the courts provided consistency among the hearings boards. Because they provided the necessary differentiation from Oregon as well as the benefits of local knowledge, the creation of the three boards was accepted.

ii. Absence of CTED Authority in Rulemaking and Approval

Though the CTED is the GMA’s main enforcement agency, two notable powers were not given to the department: rulemaking and approval of comprehensive plans. In contrast, Oregon had given both authorities to its LCDC. Furthermore, under Washington’s Shorelines Management Act, the Department of Ecology’s powers include approving local governments’ shorelines master plans and rulemaking authority. Thus, the CTED’s lack of authority is a significant departure.

Addressing why CTED did not receive rulemaking authority, lobbyist Dave Williams explained that the Association of Washington Cities “resisted CTED getting rulemaking authority—to tell us how to do it, by rule. We like guidance, we like suggestions, we don’t like hard and fast rules.” But Williams recognized that some planning professionals


78. Arguments that the courts would provide consistency, and that the boards could look at case law over time, were merely arguments demonstrating that the three boards could be of equal worthiness to one board. Interview by Diane Wiatr with Joe Tovar, president of Wash. City Planning Directors (July 17, 2005), available at http://www.secstate.wa.gov/oralhistory/pdf/OH833.pdf. But the number of boards should not be outcome determinative on the number of petitions for review. In fact, the certainty of the law needed by developers is undermined by inconsistent decisions.

79. Lucy Steers stated, “Having traveled around the state with the Growth Strategies Commission, I understood the need for regional sensitivities. Because I saw first hand how incredibly different philosophically and politically and issues-wise these areas were.” Interview by Diane Wiatr with Lucy Steers, president of League of Women Voters of Seattle, 1987–97, member of the Growth Strategies Comm’n, and founding board member of Futurewise (Aug. 11, 2005), available at http://www.secstate.wa.gov/oralhistory/pdf/OH827.pdf.


82. Mr. Williams was the lobbyist for the Association of Washington Cities and was involved in subsequent amendments. See Interview by Rita R. Robison with Dave Williams, lead lobbyist for Association of Washington Cities, 1990–present (Sept. 19, 2005), available at http://www.secstate.wa.gov/oralhistory/pdf/OH834.pdf.

saw the benefits of having rulemaking authority. Statewide rules provide more guidance to local planners, minimize the efforts of some jurisdictions to attract business by having lax regulations, and provide political cover to local officials by allowing them to say that "the state made us do it." However, local officials were not prepared to publicly endorse mandatory statewide rules, as to do so would have been political suicide for some. In addition, local officials have a sense of paternal sovereignty in their relationship to their jurisdiction, which a statewide approval process would infringe upon.

The absence of authority for comprehensive plan approval also has a negative side. By having the comprehensive plans considered valid upon adoption without any prior or subsequent requirement for approval by a statewide agency such as CTED, noncompliance with the GMA can only be found through the adjudicative process of the hearings boards. There are many instances of noncompliance that could potentially slip through simply because nobody petitions a hearings board for review.

Additionally, though some argue that the absence of an approval requirement creates more litigation than there would be otherwise, such an assertion is questionable. For example, Oregon, where approval is required, has had at least 180 appeals from the decisions by the LCDC since 1977 in the state supreme court and courts of appeals. In comparison, Washington has had at least sixty appeals from decisions by hearings boards since 1995 in the state supreme court and courts of appeals. These numbers show that the number of appeals for each state

84. Id.
85. Id.
86. However, Steve Hodes provided a good assessment of why regional boards do not necessarily lead to more flexibility or sovereignty for local governments:

    Basically the key reason they could live with the act was its flexibility, because so much of it was defined at the local level. I would say that there was some sense in which this was an entirely—a little disingenuous quality to this because it was clear from the beginning, by the drafters, that what you were developing was a kind of web of regulations. It wasn’t that any particular regulation would take you in the right direction. It was the enormous complexity and the diverse regulations that would push you toward good behavior, good performance, and maybe ultimately even toward a more centralized system—just because it would be too difficult to operate with so many regulations rather than asking someone to interpret them for you.


was nearly the same on a per-decade basis, revealing no real difference in the overall amount of litigation between the two approaches.

In addition to judicial appeals of board decisions, a hearing before a regional board in Washington itself arguably mirrors the litigation process, while Oregon takes an administrative approach. If the petitions to the hearings boards were included in the litigation statistics, Washington’s dispersed approach is several-fold more litigious than Oregon’s. Moreover, one may validly assume that the certainty provided by an executive decision establishing validity as in Oregon would be preferable to the uncertainty created in Washington by the persistent question of whether a local decision is valid and will be appealed. Because Washington’s approach is more litigious and uncertain, the dispersed approach provides much less assurance that the GMA goals and requirements will be upheld.

(b) How Significant is the Difference Between Centralized and Dispersed?

Washington politicians enacted a dispersed approach without a government enforcement “watchdog,” in stark contrast to Oregon’s centralized legislation. The argument that carried the political day was that Oregon’s approach was over-centralized, even authoritarian. It can be said that Oregon did not allow for the differences between metropolitan and rural counties, or for how different those two populations could be. Therefore, it is necessary to consider the extent of centralization in Oregon’s design, and whether Washington’s GMA is as dispersed as this Article may suggest. In the end, is the difference between the two systems semantic? Or is one solution more efficacious than the other?

Though Oregon’s system does contain elements of local control, it remains quite centralized. Under that system, each county is required to establish urban growth boundaries and comprehensive plans consistent with state-wide planning goals. These plans are then forwarded to the LCDC for review and approval. The approval requirement strikes critics as state planning and therefore centralized. However, even the LCDC approval requirement does not conclusively indicate that Oregon’s approach is centralized. Local governments still retain the authority to create comprehensive plans and to adopt development regulations that fulfill

91. Id. § 197.090(2)(a).
those plans.\textsuperscript{92} The LCDC cannot make the plans or adopt the development regulations; rather, the LCDC can only make a determination whether the plans or regulations fulfill the growth management goals. Because of this local governmental authority, whether Oregon's system is truly centralized depends on the deference owed to local decisions. If the agency must give broad deference to local decisions, nearly all local decisions will be upheld, but if the agency reviews local decisions de novo, or without deference to local decisions, then the approach is very centralized. In actuality, Oregon law affords the LCDC great discretion over whether a local decision complies with the growth management goals because no burden is assigned to any party.\textsuperscript{93} The LCDC also has the authority to create new growth management goals.\textsuperscript{94} Because of this lack of deference to local decision making, Oregon's scheme is centralized and contains mechanisms for enforcement.

Though Oregon's scheme should be considered centralized, all schemes that require state approval need not be centralized. If the state review body was required to use the standard of review of "arbitrary and capricious," the body would only overturn a local government's decision when the local government exercised a blatant disregard for the facts or law—the most extreme of cases. Great deference such as the arbitrary and capricious standard would provide extraordinary room for local discretion. Certainly this approach would be much more dispersed than centralized, while still having an element of state approval.

In Washington, while there is no mandated state approval, the hearings boards do act in a similar capacity over singular issues within the context of compliance with the GMA. Since 1997, the hearings boards have applied the "clearly erroneous" standard of review.\textsuperscript{95} This is something more than the "substantial evidence" standard under the Administrative Procedures Act, but less than arbitrary and capricious.\textsuperscript{96} Thus, whether Washington's scheme is centralized or dispersed hinges on other factors.

Among the factors proponents point to when labeling the GMA as dispersed is the presumption that local actions are "valid upon adoption."\textsuperscript{97} But "valid upon adoption" is not an assignment of burden of

\textsuperscript{92} Id. § 197.010.
\textsuperscript{93} Id. § 197.090(2)(a).
\textsuperscript{94} Id. §§ 197.040(1)(c), .040(2)(a).
\textsuperscript{95} WASH. REV. CODE § 36.70A.320(3) (2006).
\textsuperscript{96} See id. § 34.05.
\textsuperscript{97} Id. § 36.70A.320(1).
proof, a quantum of proof, or a standard of review. Rather, the requirement is a procedural one. Oregon could have just as easily had this presumption and yet their approach would still be centralized if the LCDC afforded no deference to the local decisions.

Additionally, several requirements suggest that the GMA is more centralized than generally believed. First, all comprehensive plans must be submitted to CTED, which does not approve local government decisions but does provide comments to the local governments about their plans. These CTED comments are important in citizens’ petitions to hearings boards for review of the comprehensive plans. Second, the governor can grant standing to private citizens who do not meet the statutory requirements, thus demonstrating another element of central control over the GMA. Third, the Office of Financial Management acts as a centralized agency under the GMA by establishing a projected twenty-year population range, within which the counties must size their urban growth areas.

Fourth, there are exhaustive statutory requirements mandating study and development of regulations for housing, transportation, rural areas, and natural resource areas, as well as requirements for review and revision of the county’s growth plan. Finally, the GMA goals themselves constrain local actions. Each of these factors tends to indicate a more centralized approach.

Despite these more centralized requirements, the fact that Washington does not require state-approval remains an important distinction when classifying the GMA as centralized or dispersed. For instance, the hearings boards only hear particular issues and assess whether those components of the local action comply with the GMA; they do not consider entire comprehensive plans. Moreover, the board must wait for petitions before it can act. This means that noncompliant local actions can escape scrutiny until and unless a challenge is brought. Because there is a sixty-day window for individuals to petition the hearings boards, there is little opportunity for hearings boards to review these noncompliant local actions. In addition, citizens may know about noncompliant actions, but they may be ambivalent or even support the noncompliance.

98. Id. § 36.70A.040.
99. Id. § 36.70A.280(2)(c).
100. Id. § 36.70A.110(2).
101. Id. § 36.70A.070.
102. Id. §§ 36.70A.130, .215.
103. Id. § 36.70A.290(2).
Proponents of categorizing Washington's GMA as dispersed also point to the fact that the GMA only gave CTED authority to create guidelines for designation of agricultural, forest, and mineral resource areas. 104 There is some debate over what local governments must do to comply with the guidelines. Most consider the guidelines merely advisory and feel that local governments need only "consider" them. In contrast to such advisory guidelines, a growth management law that gives an agency rulemaking authority, such as Oregon's, would be more centralized. However, the fact that the Washington plan includes no rulemaking authority does not necessarily mean that it can best be described as dispersed. The hearings boards are still charged with interpreting the GMA and may need to create judicial tests. 105 Consequently, the discretion afforded to hearings boards to create judicial tests will impact the degree to which the GMA is centralized or dispersed.

It might also be contended that since the legislative intent was for the GMA to have a dispersed approach, any greater discretion by hearings boards violates GMA policy and intent. However, such an interpretation would run counter to other GMA legislative policies, such as protecting farmland and critical environmental areas. Rather than focus on the semantics of "bottom-up" or "top-down," courts should consider which approach best serves the explicit GMA goals. Where the GMA lands on the continuum from absolutely centralized to absolutely dispersed largely depends on judicial interpretations of the extent to which CTED rules are binding and on the powers of hearings boards to create judicial tests. The success of NGOs to enforce the GMA requirements will largely depend on these court decisions.

D. Organizations

The various methods of enforcement associated with the GMA are generally carried out by the organizations and public interest groups associated with the GMA. Three organizations are important to the dispersed versus centralized distinction and the assurance that local

104. Id. § 36.70A.131.

105. See City of Bremerton v. Kitsap County, Final Dec. & Order, GMHB No. 95-3-0039c (Oct. 6, 1995). Decisions of the hearings boards are published on the Boards' website at http://www.gmhb.wa.gov and are available on Westlaw. Case number format is "XX-X-XXXX," where the first two digits represent the year the petition was filed, the last four digits represent order in which the petitioned was filed, and the middle digit represents which board the case is before. The Eastern Board is "1," the Western Board is "2," and the Central Board is "3." For the purposes of this Article, Board decisions are cited as follows: "abbreviated caption, GMHB No. XX-X-XXXX, Decision at xx (date)."
legislative actions comply with GMA goals and requirements. These organizations are: (1) the Growth Management Hearings Boards; (2) the CTED; and (3) public interest groups, principally Futurewise.

1. Growth Management Hearings Boards

The GMA created the three hearings boards to hear petitions which allege that a local legislative action fails to comply with the GMA. These boards are geographically based: (1) the Central Puget Sound Growth Management Hearings Board (Central Board), covering Snohomish, King, and Pierce counties; (2) the Western Washington Growth Management Hearings Board (Western Board), covering all western Washington counties except for those covered by the Central Board; and (3) the eastern Washington Growth Management Hearings Board, covering counties in eastern Washington. The hearings boards are composed of members, each of whom was appointed by the governor to a six-year term. Additionally, the GMA requires that there be at least one lawyer and one former local government official with planning experience on each board.

2. CTED

Prior to enactment of the GMA, the CTED was primarily tasked with encouraging international trade and foreign investment from Asian countries as well as encouraging economic development through county port districts. The GMA altered the role of the CTED, however, giving it the burden of growth management oversight. The CTED’s duties include the following: (1) reviewing each comprehensive plan and providing comments to the local government; (2) granting extensions to local governments for compliance with comprehensive planning timetables; (3) designating agricultural, forest, mineral resource, and critical areas; (4) creating timetables for comprehensive plan submittal; (5) adopting guidelines for the designation of agricultural, forest, mineral resource, and critical areas; (5) providing mediation when cities dis-

107. Id. § 36.70A.260.
108. Id.
111. Id. § 36.70A.380.
112. Id. § 36.70A.170.
113. Id. § 36.70A.045.
114. Id. § 36.70A.050.
agree with their county’s UGA designation;\(^{115}\) (6) providing a schedule for counties to review and revise comprehensive plans;\(^{116}\) (7) creating model mineral resource land development regulations;\(^{117}\) (8) collecting the counties’ five year reports;\(^{118}\) (9) establishing a technical assistance and grant program;\(^{119}\) (10) managing a granting program;\(^{120}\) (11) providing mediation upon the governor’s request in the event that a county fails to adopt county-wide planning policies;\(^{121}\) (12) providing a list of methods used by counties in creating their county-wide planning policies and reporting this to the Legislature;\(^{122}\) (13) receiving decisions made by the superior courts on cases appealed from the hearings boards;\(^{123}\) and (14) undertaking pilot projects to determine whether the several statutorily required environmental reviews can be streamlined.\(^{124}\) Though this list of duties is relatively extensive, it is generally limited to providing guidance. Instead of taking the centralized approach of Oregon, where each local comprehensive plan is approved by the LCDC, Washington limited the CTED to providing guidance to local governments regarding their comprehensive plans.\(^{125}\)

3. Public Interest Groups and Futurewise

One of the most prominent and effective means of enforcing the GMA are the actions of public interest groups, particularly a group now called Futurewise. Early on in the creation of the GMA, Joe King, then Speaker of the Washington State House of Representatives, received advice from Oregon to establish a non-profit organization whose mission was to aid with local government planning and to enforce the GMA.\(^{126}\) Several key players involved in the 1990 and 1991 GMA enactments

\(^{115}\) Id. § 36.70A.190(5).
\(^{116}\) Id. §§ 36.70A.130(4), .130(5)(b), .130(5)(c).
\(^{117}\) Id. § 36.70A.131(2).
\(^{118}\) Id. § 36.70A.180(2).
\(^{119}\) Id. §§ 36.70A.190, .210(6).
\(^{120}\) Id. § 36.70A.500.
\(^{121}\) Id. § 36.70A.210(2)(d).
\(^{122}\) Id. § 36.70A.210(5).
\(^{123}\) Id. § 36.70A.295(6).
\(^{124}\) Id. § 36.70A.385.
\(^{126}\) Interview with Joe King, former Speaker of the Wash. House of Representatives, (Aug. 3, 2005), stating that Oregon Republican Senator Stafford Hansell told King, “You also need to set up a strong watchdog group.”
helped found “1000 Friends of Washington” in 1990.\textsuperscript{127} In 2005, 1000 Friends of Washington changed its name to Futurewise.\textsuperscript{128}

Today, Futurewise has a board of directors with 23 members and 13 employees.\textsuperscript{129} Mary McCumber serves as the board’s president, and there is a full-time executive director and three part-time field directors based in Snohomish, Skagit, and Spokane counties who work with local citizens and governments concerning planning, resource protection, and community building.\textsuperscript{130} When amendments of comprehensive plans or development regulations are proposed or required, the field directors help mobilize local discussion and action.\textsuperscript{131} The field directors play a vital role in relaying grassroots information to Futurewise’s main office, located in Seattle. The planning director, legal director, urban policy director, executive director, and the relevant regional field director discuss currently pending amendments of comprehensive plans, how to communicate Futurewise’s position to the local government, and when litigation is necessary.\textsuperscript{132} An advisory board to the legal team also helps determine when litigation is necessary and develops broader litigation strategies.\textsuperscript{133}

Although there is no statutory language in the GMA creating Futurewise, from the beginning the organization has been very much a part of the GMA. Futurewise has fulfilled a vital role in the GMA’s dispersed approach to growth management by ensuring local actions are compliant with the GMA. In many respects, this has made Futurewise the trustee of the GMA’s goals and requirements, albeit an advocate that is chronically challenged by the fund-raising issues that typically haunt voluntary and non-government organizations. Indeed, the Futurewise saga is even more remarkable when measured against the relatively unlimited financial and political resources of developers.

The first years of Futurewise were primarily focused on institution building and providing guidance to local governments that were enacting


\textsuperscript{129} Futurewise, http://www.futurewise.org (last visited Aug. 6, 2007).

\textsuperscript{130} \textit{id.}

\textsuperscript{131} \textit{id.}

\textsuperscript{132} \textit{id.}

\textsuperscript{133} \textit{id.}
their first comprehensive plans. Joe King viewed the original objective of Futurewise as a land use group “that studied and provided expert levels of staffing on growth issues” and would “hold local governments’ feet to the fire . . . .” When the CTED created its first guidelines for designating natural resource lands and critical areas, it asked Futurewise to provide input. Futurewise also litigated before the hearings boards on a limited basis during the 1990s. The litigation was mostly done via intervention or filing of amicus curiae briefs in cases already before the boards.

Despite Futurewise’s professed neutral stance on growth, some people view Futurewise as an antigrowth, environmental group. This “antigrowth” perception may stem from Futurewise’s recent litigation successes. For example, prior to 2001 Futurewise had a full time planning director who was a lawyer. A full time legal director was added in 2001, expanding the Futurewise legal team. Futurewise has also established a cooperating attorney program for pro bono assistance on projects. As of August 2006, there were eighteen such cooperating attorneys, five of whom were actively involved in cases.

Given its budget and reliance on volunteer lawyers, the record of Futurewise’s legal program has been noteworthy. According to Futurewise’s records, between 2001 and 2006 its legal team won twenty-five of thirty petitions before the hearings boards, five of seven before superior courts, one before the court of appeals, and one before the Washington Supreme Court. In comparison, other GMA public interest groups won about half of their petitions before the hearings boards, while developers won only a third of their petitions before the Central Board. This success framed Futurewise not only as a winner, but by

135. Id.
137. Interview with Joe King, supra note 134.
138. Internal Futurewise records.
139. Internal Futurewise records.
140. These numbers are based on my personal assessment of outcomes of each case for 1997 to 2006 before the Central Board. Calculations were not tabulated issue-by-issue within each case, but rather whether one issue was won in a case by a developer or public interest group. Before the Central Board, Futurewise won about two-thirds of their cases. Large developers outperformed small developers, winning about half of their cases. In addition to the out-performance by public interest groups, public interest groups filed about two-thirds of the petitions for review.
some people as antigrowth, even though Futurewise has never claimed to have this as a categorical objective.

While Futurewise has a track record of winning, three recent state Supreme Court case could jeopardize the group’s ability to enforce GMA goals and requirements through the hearings boards. First, Quadrant v. State Growth Management Hearings Board\textsuperscript{141} sets a precedent for less deference to hearings boards’ decisions by appellate courts.\textsuperscript{142} Second, Viking Properties, Inc. v. Holm\textsuperscript{143} may be construed as forbidding hearings boards from making judicial bright line tests.\textsuperscript{144} And third, the court of appeals in City of Redmond v. Central. Puget Sound Growth Management Hearings Board (Grubb)\textsuperscript{145} restricted the ability for hearings boards to alter the burden of proof through judicial tests.\textsuperscript{146} A roll back of the hearings boards’ authority would be a set-back for Futurewise’s attempts to ensure local government compliance with the GMA. Furthermore, the reduced ability for Futurewise and other citizen organizations to enforce the GMA’s goals and requirements through petitions to the hearings boards would impinge on their ability to act as the GMA’s trustees.

III. EMPIRICAL ANALYSIS

Because the effectiveness of enforcement is one of the most important distinctions between a dispersed and centralized approach to growth management, an analysis of the successes and failures of Futurewise and developers in relation to the GMA is relevant. The results of the efforts of these two groups can be seen through statistics showing winning percentages as well as case studies involving Futurewise.

A. Study of Winning Percentages

This section discusses the known success rates of Futurewise, public interest groups, and developers before the hearings boards. In order to arrive at a basic understanding of the success of Futurewise, public interest groups, and developers, the author analyzed all the decisions made by the Central Board since 1997. The outcomes of the cases since the 1997 GMA amendments provide relevant statistical information as to the success of public interest groups versus developers before the hearing

\textsuperscript{141} 119 Wash. App. 562, 81 P.3d 918 (2003).
\textsuperscript{142} See id.
\textsuperscript{143} 155 Wash.2d 112, 118 P.3d 322 (2005).
\textsuperscript{144} Id. at 129, 118 P.3d at 331.
\textsuperscript{146} Id. at 58, 65 P.3d at 342.
boards. The following table tabulates the case outcomes for petitioning parties before the Central Board since the 1997 amendments.

<table>
<thead>
<tr>
<th>Year</th>
<th>Public Interest Groups</th>
<th>Futurewise Subcategory of Public Interest</th>
<th>Developers</th>
<th>Big Developers Subcategory of Developers</th>
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<td>W</td>
<td>L</td>
<td>W</td>
<td>L</td>
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<tr>
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<td>-</td>
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<tr>
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<td>3</td>
<td>6</td>
<td>-</td>
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</tr>
<tr>
<td>2003</td>
<td>6²</td>
<td>3</td>
<td>1</td>
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147. Analysis conducted on August 1, 2006 by Brock Howell (see acknowledgement, supra note †). To conduct this analysis, the decisions and orders were copied from Central Boards' website to an Excel spreadsheet. Once the information was sorted and edited, each case since 1997 was reviewed. After each review, the winner—the petitioner or the respondent—was marked. The tabulations indicate the success and failure of public interest groups versus developers. Any case in which the board found in favor of any of the petitioner's arguments was counted as a win for the petitioner. Counting each of the issues would be far too difficult, would not reflect the fact that petitioners have a tendency to over-plead issues, and would not reflect the fact that not all issues are disposed of. Both procedural and substantive wins were counted. Board decisions pursuant to a court reversal and remand were ignored as the survey was directed at what the board independently decided, not what it was told to do.

148. The table has a number of limitations: (1) As petitioners often make numerous arguments, each with varying worthiness and impact, there is likely a greater percentage of "wins" than are truly present; (2) Because there is varying impact of each winning argument, it is difficult to assess whether developers or public interest groups are more effective in their petitions; (3) Not included in the tabulations are cases that were dismissed due to settlement agreements. The impact of these cases, positive or negative, towards the desires of public interest groups are unknown without much more detailed analyses; (4) Negotiations prior to adoption of comprehensive plans and development regulations were not considered. As a result, the success of developers versus public interest groups is hard to know; (5) At least one case was left out because it was unclear whether to classify the petitioning party as a developer or public interest group; and (6) There is no good definition for a "public interest group," and not all groups are altruistic in serving as the GMA's trustees.

149. Large developers include Cosmos Development Corporation (co-petitioner with Benaroyo Shareholders Trust & Universal Holdings Partnership), Port of Seattle, Chevron, Port Blakely Tree Farms, Weyerhaeuser Real Estate Company, Mac Angus Ranches, Home Builders Association of Kitsap County, Master Builders Association of King & Snoqualmie Counties, Boeing, Seattle-King County Association of Realtors, Camwest Development, Overton & Associates, and Safeway.
Of the thirteen cases won by developers discussed in the table above, only four were won by small developers. In other words, 69.2% of the cases won by developers were won by large developers. This suggests that larger developers with greater financial wherewithal and legal experience have a much greater chance at success, but even then the winning percentage for large developers is less than that of public interest groups. That is not to suggest that these winning percentages provide a complete picture. In fact, many developers’ victories are achieved outside of the judicial system through negotiation for favorable ordinances and amendments to the comprehensive plans. Nonetheless, as the table reflects, while large developers have experienced some success in their petitions, public interest groups have apparently done better.

Although other public interest groups have done well in petitions before the growth management boards, Futurewise has arguably done the best. Of the twenty cases won by public interest groups between 2003 and 2006, eleven were won without Futurewise’s aid. Furthermore, other petitioning parties participated in six of the cases won by Futurewise, indicating that public interest groups could have won seventeen of the twenty cases without Futurewise. However, Futurewise was far more efficient in winning their cases than their brethren between 2003 and 2006. Non-Futurewise groups posted a success rate of 45.8% while Futurewise boasted 64.3%. Non-Futurewise groups managed merely eleven wins in twenty-four tries while Futurewise earned nine in fourteen. Additionally, Futurewise contributed only five losses to the eighteen lost by public interest groups.

Futurewise’s litigation also has another advantage over other public interest groups. While most public interest groups merely attack an individual problem when it comes along, Futurewise plans its appeals and petitions with a broader purpose. For example, Futurewise is currently in the midst of pursuing several petitions before the three growth management boards. These petitions pursue three goals: (1) identifying generally prohibited densities inside and outside the UGAs; (2) defining the differences between the multiple review and evaluation procedures as prescribed in sections 36.70A.130 and .215 of the Revised Code of Washington; and (3) establishing a framework and working definition of

<table>
<thead>
<tr>
<th></th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>TOTALS</th>
<th>WIN %</th>
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</thead>
<tbody>
<tr>
<td>cases</td>
<td>9</td>
<td>5</td>
<td>1</td>
<td>45</td>
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</tr>
<tr>
<td>wins</td>
<td>4</td>
<td>6</td>
<td>3</td>
<td>12</td>
<td>66.6 %</td>
</tr>
<tr>
<td>losses</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>7</td>
<td>31.7 %</td>
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<td>28</td>
<td>47.4 %</td>
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“limited area of more intense rural development” (“LAMIRD”).\textsuperscript{150} As a consequence, Futurewise’s broader scope likely has a more meaningful impact on the interpretation of the GMA than the ad hoc approach by the uncoordinated litigation of the other public interest groups.

Overall, using the dataset from above, petitioners won 43.7\% of their cases before the growth board. This high percentage of wins is surprising considering that county and city decisions are “presumed valid” and only overturned if “clearly erroneous.”\textsuperscript{151} While hearing boards may be exercising excessive discretion, the high percentage of wins may be due to effective litigation by petitioners, disdain by local governments in complying with the GMA, or a combination of the two. Also, there is likely an over-representation of wins in the tabulation.\textsuperscript{152}

The difference in winning percentages between public interest groups and developers can largely be seen as a result of the GMA framework. The GMA relies on public interest groups to protect the GMA’s interests of protecting the environment, farming, forestry, and community character. When a county fails to comply with these requirements, public interest groups are much more likely to file a petition for review than a developer; developers are most likely to seek review to protect the GMA’s private property rights goal.\textsuperscript{153} While developers are not necessarily opposed to protection of critical environmental, agricultural, or forest land, the fact is that development regulations restrict the ability of developers to pursue their desired development. Therefore, interests that restrict development are much more likely to be protected by the actions of public interest groups.

However, while developers may seek review most often based on the goal of bolstering private property rights, they may find that such an approach is not especially successful. This is particularly true given that local governments have the statutory authority to balance the GMA’s thirteen goals as they see fit.\textsuperscript{154} Additionally, the GMA provides several requirements to protect resources and critical areas and encourage urban development but provides no requirement to further the GMA goal of protecting private property rights. Thus, developers hoping to overturn unfavorable regulations before the board in the name of property rights

\begin{footnotes}
\item[150] WASH. REV. CODE § 36.70A.070(d) (2006).
\item[151] Id § 36.70A.320.
\item[152] The reasons for the potential over-representation of wins is discussed supra note 147.
\item[153] See WASH. REV. CODE § 36.70A.020(6).
\item[154] Vashon-Maury v. King County, Final Dec. & Order, GMHB No. 95-3-0008c Decision at 89 (Oct. 23, 1995).
\end{footnotes}
must contend with board discretion that is, again, more favorable to public interest groups.

In order to overcome the obstacles presented by the boards, developers often resort to the local legislative process, making it more difficult to discern how well the GMA is being enforced. When creating development restrictions, local governments are much more likely to pass rules that are less restrictive, where county and city councils are not likely to ignore the pressures for increasing economic development. Developers have facilitated such conversations and negotiations with local legislators through successful litigation of procedural issues, such as public notice and participation requirements. Because private conversations and negotiations between local legislators and developers are unquantifiable, it is hard to know whether public interest groups are indeed winning in their battle to protect the GMA. It is also hard to know if reliance on public interest organizations to enforce the GMA is as effective as Oregon’s centralized system and its legislatively mandated enforcement mechanisms.

B. Futurewise Case Studies

Three cases demonstrate how Futurewise and other NGOs enforce GMA goals. A short description of these cases places the dispersed approach of the GMA, as well as the importance of the burdens of proof and standards of review in perspective.

In *Citizens for Good Governance v. Walla Walla County*, the actions of Futurewise helped protect thousands of acres of farmland. In that case, the county had adopted a comprehensive plan in 2001 and development regulations in 2002, both of which allowed for urban densities in rural and critical areas. In addition, while the regulations established a LAMIRD adjacent to a designated urban growth area, they failed to properly designate and conserve agricultural land of long-term commercial significance. Futurewise, Citizens for Good Governance, and the City of Walla Walla petitioned the Eastern Board to review both the comprehensive plan and development regulations. The Eastern Board

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155. E.g., Weyerhaeuser Real Estate Co. v. City of DuPont, Final Dec. & Order, GMHB No. 98-3-0035 (May 19, 1999).
156. *Citizens for Good Governance v. Walla Walla County*, Final Dec. & Order, GMHB Nos. 01-1-0014cz & 01-1-0015c (May 1, 2002).
157. *Id.*
158. *Id.*
159. *Citizens for Good Governance v. Walla Walla County*, Final Dec. & Order, GMHB Nos. 01-1-0014cz & 01-1-0015c (May 1, 2002); City of Walla Walla v. Walla Walla County, Final Dec. & Order, GMHB No. 02-1-0012c (Nov. 26, 2002).
found the comprehensive plan and development regulations were non-compliant with the GMA. After appealing to the superior court and then to the court of appeals, the County finally relented and settled with respect to the rural land, critical area, and LAMIRD issues. The County eventually lost on remand as to the agricultural protection issues and is now in compliance with the GMA. This case helped protect approximately 9,000 acres of rural land and over 700,000 acres of farmland.

Another example of a Futurewise success is Hensley v. Snohomish County. In Hensley, Snohomish County had enacted a comprehensive plan that expanded the Arlington urban growth area by 110 acres when; (1) the expansion was not necessary; (2) the area was subject to significant and frequent flooding; and (3) the area met all the GMA criteria for agricultural land of long-term commercial significance. Additionally, the county converted 218 acres of farmland to a ten-acre ranchette development and redesignated nine acres of undeveloped rural land as LAMIRD to allow a multi-service truck stop along Interstate Five. After much litigation, Futurewise was able to overturn these actions, re-

160. Citizens for Good Governance v. Walla Walla County, Final Dec. & Order, GMHB Nos. 01-1-0014cz & 01-1-0015c (May 1, 2002); City of Walla Walla v. Walla Walla County, Final Dec. & Order, GMHB No. 02-1-0012c (Nov. 26, 2002).


163. City of Walla Walla v. Walla Walla County, Order on Remand, GMHB No. 02-1-0012c (Dec. 16, 2003); City of Walla Walla v. Walla Walla County, Third Order on Compliance, GMHB No. 02-1-0012c (Mar. 10, 2005); City of Walla Walla v. Walla Walla County, Order Finding Compliance, GMHB No. 02-1-0012c (Aug. 1, 2006).


resulting in the protection of agricultural land from inclusion as an urban growth area.\textsuperscript{167}

Still another example of Futurewise’s attempts to enforce the GMA’s goals is \textit{1000 Friends of Wash. v. Thurston County}.\textsuperscript{168} There, the County had updated its comprehensive plan in 2004, permitting 60 percent more population growth than necessary within its urban growth area.\textsuperscript{169} Also, the County’s updated plan significantly under-designated agricultural land of long-term commercial significance while maintaining more than 21,000 acres of rural land at densities of one unit per five acres.\textsuperscript{170} The Western Board found each of these provisions failed to comply with certain GMA requirements, although the provisions did not violate the GMA goals.\textsuperscript{171} The County appealed the decision to superior court and then sought and received a growth board certification to file the case with the court of appeals.\textsuperscript{172} Before the court of appeals officially accepted the case, the County filed a petition with the Washington State Supreme Court to accept direct review, which is still pending.\textsuperscript{173}

The winning percentages and these case examples provide some insight into how Futurewise and other public interest groups have performed as unofficial GMA trustees through petitions to hearings boards. The future success of these GMA trustees rests greatly upon how boards and courts continue to interpret burdens of proof and standards of review when considering petitions in light of the Legislature’s intent for a dispersed approach to growth management.

\begin{itemize}
\item \textsuperscript{167} Hensley v. Snohomish County, Final Dec. & Order, GMHB No. 03-3-0009c (Sept. 22, 2003); Hensley v. Snohomish County, Order Finding Validity of Prior Plan Provisions and Rescinding Invalidity, GMHB No. 03-3-0009c (Oct. 13, 2003); Hensley v. Snohomish County, Order on Reconsideration, GMHB No. 03-3-0009c (Oct. 21, 2003); Snohomish County v. Hensley, Ct. of App. Case No. 55693-2-I (Wash. Ct. App. Feb. 12, 2007) (unpublished opinion, reversing Snohomish County Superior Court decision).
\item \textsuperscript{168} 1000 Friends of Wash. v. Thurston County, Final Dec. & Order, GMHB No. 05-2-0002 (July 20, 2005).
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\end{itemize}
VI. CONCLUSION

"Upon this point a page of history is worth a volume of logic."  

The lesson of Washington's way of combating sprawl can perhaps be best summed up by this quote: "You fight [sprawl] with the [laws] you have . . . [not the [laws] you might want or wish to have at a later time]." Interestingly, Oregon's centralized plan triggered a taxpayer revolt resulting in a law that now seriously hampers growth management by requiring authorities to pay taxpayers whenever they restrict the use of their land. Though Washington landowners seeking to exploit every square inch of their property backed a similar referendum requiring payment as a consequence of growth management restrictions, that effort was soundly defeated.

Washington's GMA lacks the symmetry and logic of the Oregon plan, but arguably the role of the public in its enforcement is the key to its survival when faced with the political opposition designed to impede it. A reliance on citizen enforcement has the virtue of deflecting what might emerge as anger against a government bureaucracy, a problem the Washington GMA does not have. On the other hand, the somewhat weak Washington GMA adjusts itself to local politics in a way that sometimes creates political and developer pressure, especially on local officials reluctant to invoke the GMA at all. Despite the litigation

175. Donald Rumsfeld, Secretary of Defense, in a town hall meeting with soldiers in Kuwait. U.S. Department of Defense News Transcript, Office of the Assistant Secretary of Defense (Public Affairs), Dec. 8, 2004, available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=1980 ("As you know, you go to war with the Army you have. They're not the Army you might want or wish to have at a later time.") Id.
176. On Nov. 2, 2004, Oregon voters passed Ballot Measure 37 by 1,054,589 (61%) to 685,079 (39%). http://en.wikipedia.org/wiki/List_of_Oregon_ballot_measures. The measure provided that the owner of private real property is entitled to receive just compensation when a land use regulation is enacted after the owner or a family member became the owner of the property if the regulation restricts the use of the property and reduces its fair market value. In lieu of compensation, the measure also provided that the government responsible for the regulation may choose to "remove, modify or not apply" the regulation. http://www.sos.state.or.us/elections/nov2004/guide/meas/m37_text.html. The measure became effective on Dec. 2, 2004, 30 days after the election. See also, F. Barringer, Rule Change in Oregon May Alter the Landscape, N.Y. TIMES, Nov. 26, 2004, at A1. ("Richard J. Lazarus , a law professor at Georgetown, [speaking just before the vote adopting Measure 37] called the measure a blunt instrument that could undermine all zoning and environmental protections and undercut land values").
successes of NGOs such as Futurewise, the future of citizen efforts to combat sprawl remains tied to the fundraising capacity of organizations dedicated to defending the GMA. These organizations face a year-to-year effort to raise enough money to keep their offices open, making it difficult for them to confront well-connected and well-heeded proponents of development who may be more concerned with profit than the environment or transportation.

Indeed, the history of Washington’s GMA suggests that, given the often unrelenting opposition to the law, the state is lucky to have the regulation it enjoys at all. A more coherent and official statewide enforcement apparatus as exists in Oregon seems out of the question. The answer to the problems of a dispersed and citizen-enforced system is supplied more by the history of managed growth’s origins in Washington than it is by legislative logic. At the very least, the Washington scheme did provide for three Growth Management Hearing Boards which can hear appeals from local governmental opinions, providing some coherence in the development of the law.

While this Article has briefly discussed the growth management hearings boards, a forthcoming article will be devoted nearly exclusively to an analysis of boards’ decisions and the impact they have on managed growth.\(^\text{178}\) Aside from a vigilant citizenry committed to “smart growth,” the boards remain the only official agency in the trenches of the anti-sprawl wars in Washington State.

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178. The subsequent Article is scheduled for publication in Issue 3 of this Volume.