

# HOUSE BILL REPORT

## ESHB 2023

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### As Amended by the Senate

**Title:** An act relating to the effective date of certain actions taken under the growth management act.

**Brief Description:** Addressing the effective date of certain actions taken under the growth management act.

**Sponsors:** House Committee on Environment (originally sponsored by Representative Fitzgibbon).

**Brief History:**

**Committee Activity:**

Environment: 2/13/17, 2/14/17 [DPS].

**Floor Activity:**

Passed House: 3/7/17, 50-47.

Senate Amended.

Passed Senate: 4/12/17, 27-22.

#### Brief Summary of Engrossed Substitute Bill

- Provides that the effective date of certain actions taken under the Growth Management Act (GMA) will be the later of the two following dates: 60 days after publication of notice of the action, or if a petition for review to the Growth Management Hearings Board (Board) is timely filed by a person with standing pursuant to the Administrative Procedure Act or the GMA, the date on which the Board's final order is issued.
- Includes, in the list of actions under the GMA subject to the effective dates of the bill: expansion of an Urban Growth Area; removal of the designation of agricultural, forest, or mineral resource lands; creation or expansion of a limited area of more intensive rural development; establishment of a new fully contained community, and; creation or expansion of a master planned resort.
- Provides that if a county is required to update its comprehensive plan because the rural element of the comprehensive plan does not comply with the GMA's requirement to protect surface water and groundwater resources, the effective date of the updated comprehensive plan is the date that the county adopts the updated comprehensive plan.

*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

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## HOUSE COMMITTEE ON ENVIRONMENT

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Fitzgibbon, Chair; Peterson, Vice Chair; Fey, Kagi and McBride.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Taylor, Ranking Minority Member; Maycumber, Assistant Ranking Minority Member; Buys and Dye.

**Staff:** Robert Hatfield (786-7117).

### **Background:**

#### Growth Management Act: Introduction.

The Growth Management Act (GMA) is the comprehensive land use planning framework for counties and cities in Washington. Originally enacted in 1990 and 1991, the GMA establishes land use designation and environmental protection requirements for all Washington counties and cities. The GMA also establishes a significantly wider array of planning duties for 29 counties, and the cities within those counties, that are obligated to satisfy all planning requirements of the GMA.

#### Growth Management Act: Comprehensive Plans.

The GMA directs jurisdictions that fully plan under the GMA to adopt internally consistent comprehensive land use plans that are generalized, coordinated land use policy statements of the governing body. Comprehensive plans are implemented through locally adopted development regulations, both of which are subject to review and revision requirements prescribed in the GMA. Each comprehensive plan must also include a plan, scheme, or design for certain specified elements, including a rural element.

#### Growth Management Act: Rural Element.

The rural element of a comprehensive plan must allow for rural development, forestry, and agriculture in rural areas, and must provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. "Rural development" is development that occurs outside an Urban Growth Area (UGA), or designated agriculture, forest, or mineral resource land.

#### Growth Management Act: Urban Growth Areas.

Counties that fully plan under the GMA must designate UGAs, areas within which urban growth must be encouraged and outside of which growth can occur only if it is not urban in nature. Planning jurisdictions must include within their UGAs sufficient areas and densities to accommodate projected urban growth for the succeeding 20-year period. In addition, cities must include sufficient areas to accommodate the broad range of needs and uses that will accompany the projected urban growth, including, as appropriate, medical, governmental, institutional, commercial, service, retail, and other nonresidential uses.

### Growth Management Act: Fully Contained Communities.

One exception to the urban growth requirement is that any county may approve new, fully contained communities outside of UGAs. These communities must meet specific planning criteria to address transit, job, and housing needs; reduce the spread of urban development into nonurban areas, and to comply with protections of designated commercial lands and critical areas. Any county that establishes a fully contained community must reserve a portion of its 20-year population projection and offset its UGAs according to this population shift. Final approval of a fully contained community is considered an adopted amendment to the comprehensive plan.

### Growth Management Act: Master Planned Resorts.

The GMA allows a county to permit master planned resorts in an area outside of any UGAs established for the county. A master planned resort is a self-contained and fully integrated development of a scale that would not otherwise be permitted in an area outside of an UGA. Master planned resorts must be located in a setting of significant natural amenities and have a primary focus on destination resort facilities consisting of short-term visitor accommodations. All capital facilities, utilities, and services located within a master planned resort must be limited in scale so as to only service the master planned resort. Full-time residences are allowed to be sited within the boundaries of a master planned resort; however, those residential use must be integrated into the on-site recreational nature of the resort.

A county may only approve a master planned resort if certain conditions are satisfied. In order for a master planned resort to be approved, the master planned resort must be envisioned in the county's comprehensive plan, existing development regulations must restrict any additional urban or suburban development within the vicinity of any master planned resort, the county must find that the land for a proposed master planned resort is better suited for a master planned resort than for commercial timber or agricultural production, and all infrastructure and service impacts must be fully considered and mitigated.

### Growth Management Act: Natural Resource Lands.

Counties and cities must designate agricultural, forest, and mineral resource lands in their comprehensive plans. "Agricultural land" means land: (1) primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products, or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to an excise tax, finfish in upland hatcheries, or livestock; and (2) that has long-term commercial significance for agricultural production. "Forest land" means land primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, and that has long-term commercial significance. "Minerals" include gravel, sand, and valuable metallic substances.

### Growth Management Act: Limited Areas of More Intensive Rural Development.

Qualifying development in rural areas is permitted under the GMA if prescribed requirements are met. For example, counties may permit limited areas of more intensive rural development in the following instances:

- rural development: allowing the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas;
- recreational and tourist uses: allowing intensification of development on lots containing, or new development of, small-scale recreational or tourist uses; and
- nonresidential/cottage industry: allowing intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses.

#### Growth Management Act: Protection of Surface Water and Groundwater Resources.

The GMA addresses the protection of surface water and groundwater resources in several ways. The definition of "rural character" refers to patterns of land use development that, among other things, are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas. The rural element of a comprehensive plan must protect rural character by, among other things, protecting surface water and groundwater resources. The land use element of a comprehensive plan must provide for the protection of the quality and quantity of groundwater used for public water supplies.

#### Growth Management Act: Enforcement Provisions.

The GMA includes enforcement and penalty provisions for public entities. A seven-member Growth Management Hearings Board (Board) established under the GMA is charged with hearing and determining petitions alleging noncompliance by state agencies, counties, or cities with the GMA and related statutory provisions. The Board must make findings of fact and prepare a written decision. Final decisions and orders of the Board may be appealed to superior court. Additionally, if all parties agree, the superior court may directly review a petition filed with the Board.

Petitions that relate to whether an adopted comprehensive plan or development regulation is in compliance with the GMA must be filed within 60 days after publication of the action. For counties, the date of publication is the date that the county publishes a notice that it has adopted the comprehensive plan or development regulations. For cities, the date of publication is the date the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations.

In issuing final decisions and orders, the Board must find the state agency, county, or city identified in the petition to be either in compliance or not in compliance with the GMA and any related and applicable statutory provisions. If the agency or local government is found to be not in compliance, the Board must generally remand the matter to the agency or local government for 180 days, within which time it must comply with applicable requirements. If, following a hearing to determine whether the agency or local government has satisfied the requirements of the remand, the Board may find that the agency, county, or city is in compliance or that it remains not in compliance. The Board may also issue a determination of invalidity for all or part of a comprehensive plan or development regulation that it determines is invalid.

### The Administrative Procedure Act.

The Administrative Procedure Act (APA) sets the process that state agencies must use when the agency takes administrative action. Individuals appealing agency actions must generally exhaust their administrative remedies with the agency prior to seeking judicial review in superior court. Agencies offer administrative hearings that are quasi-judicial to hear appeals of agency actions. Administrative hearings adjudicate appeals by interpreting agency policy and regulations. Adjudication resembles what a court does but it is less formal. Adjudicative proceedings determine legal rights, duties, or privileges when a hearing is required by law or by the Constitution.

A person has standing to seek judicial review of an agency action under the APA if the agency action has prejudiced the person, if the person's interests are among the interests that the agency was required to consider when it engaged in the agency action, and if a judgment in favor of the person would address the prejudice that the agency action caused the person.

### The Vested Rights Doctrine.

Vested rights in the context of land use law refers to the right of a property owner to use his or her property in accordance with the laws and regulations governing the division, use, or development of real property in effect on a date certain. Washington's "vested rights doctrine," which was developed by courts under the common law, is applicable if a permit application is sufficiently complete, complies with existing ordinances and codes, and is filed at a time when the ordinance or regulation the applicant seeks to develop under is in effect. If requirements are met, the application must be processed according to the laws in effect at the time of the application, regardless of subsequent changes in the law.

The Legislature has codified the vested rights doctrine, in various forms, as it pertains to land use, property development, and construction permitting. For example, the State Building Code Act requires that a valid and fully complete building permit application for a structure, which is permitted under applicable zoning or other land use control ordinances, be considered under the ordinances in effect at the time of the application. Similarly, a proposed division of land must be considered under the subdivision or short subdivision ordinances in effect at the time a fully completed application for preliminary approval is submitted.

### Vesting Under the Growth Management Act.

Under the GMA, unless the Board makes a determination of invalidity, a finding of noncompliance and an order of remand does not affect the validity of comprehensive plans and development regulations during the period of remand. Not only are rights that vested prior to a finding not affected, but also rights may continue to vest in plans and regulations subject to a finding of noncompliance unless or until they are amended or repealed by a county or city.

For determinations of invalidity issued by the Board, the effect on vested rights is prospective. The Board's determination does not extinguish rights that vested prior to receipt of the Board's order; however, after the date of receipt, rights can no longer vest to the

invalidated plans or regulations. Also, for a development permit application that did not vest before receipt of the Board's order, the application may still vest to local ordinances or resolutions determined by the Board not to substantially interfere with the fulfillment of the goals of the GMA.

### **Summary of Engrossed Substitute Bill:**

The initial effective date of certain actions under the Growth Management Act (GMA) is the later of the two following dates: 60 days after publication of notice of the action, or if a petition for review to the Growth Management Hearings Board (Board) is timely filed by a person with standing to sue under either the Administrative Procedure Act or the GMA, the date on which the Board's final order is issued.

The actions under the GMA subject to the effective dates under the bill are:

- expansion of an Urban Growth Area (UGA) designated under RCW 36.70A.110;
- removal of the designation of agricultural, forest, or mineral resource lands designated under RCW 36.70A.170;
- creation or expansion of a limited area of more intensive rural development designated under RCW 36.70A.070(5)(d);
- establishment of a new fully contained community under RCW 36.70A.350; and
- creation or expansion of a master planned resort designated under RCW 36.70A.360.

If a county is required to update its comprehensive plan in order to bring the rural element of the comprehensive plan into compliance with the GMA's requirement to protect surface water and groundwater resources, the effective date of the updated comprehensive plan is the date that the county adopts the updated comprehensive plan.

### **EFFECT OF SENATE AMENDMENT(S):**

#### The Senate amendment:

- changes the actions that are subject to the effective dates established under the act, to the following actions: the amendment of a locally adopted critical areas ordinance; the amendment of a locally adopted shoreline master program; the designation of agricultural, forest, or mineral resource lands; the reduction of a limited area of more intensive rural development; a reduction in density requirements; or, an increase in minimum lot size requirements;
- removes a provision concerning standing under the Administrative Procedure Act and the Growth Management Act; and
- removes a provision regarding the effective date of a county's comprehensive plan if the comprehensive plan is updated in response to a determination that the plan is not in compliance with the Growth Management Act's requirement to protect surface water and groundwater resources.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) This bill works toward solving the Growth Management Act (GMA) vesting issue. It would be good to add critical areas ordinances to the bill. This bill is a small, targeted fix that can eliminate a loophole in state vesting laws. Under current law, a project can vest even before there is any chance for review for a new comprehensive plan or development regulation. This leaves citizens who file an appeal without any remedy that they can ask for. And then, local governments do not have a path back to compliance. This leads to a patchwork of development outside the Urban Growth Area (UGA). The bill applies to a very finite set of actions. The bill gives any appeals a chance to work their way through the system before a right vests. In Spokane County, between the time that Spokane County expanded its UGA in July and the Growth Management Hearings Board (Board) issued its decision in November, 613 lots were allowed to vest. The bill does not change the burden of proof or standard of review at the Board. After the Board makes a finding of noncompliance, it can then invoke invalidity if it finds there will be substantial harm. For actions like the ones subject to the bill, it is fairly common to invoke invalidity because of the issue of vesting.

(Opposed) This bill represents an obstacle to vesting rights that are already being challenged. It is important to find an appropriate strategy for growth, but it is also important to find some certainty with regard to vesting certainty. The Board is supposed to give substantial deference to local ordinances. People are making good faith investments in development based on the current system, and there is some certainty in the current system.

**Persons Testifying:** (In support) Representative Fitzgibbon, prime sponsor; Bryce Yadon, Futurewise; and Dave Andersen, Department of Commerce.

(Opposed) Bill Stauffacher, Building Industry Association of Washington.

**Persons Signed In To Testify But Not Testifying:** None.