VETO MESSAGE ON SB 6637-S

March 30, 1996

To the Honorable President and Members,
The Senate of the State of Washington
Ladies and Gentlemen:

I am returning herewith, without my approval as to sections 3 and 5, Substitute Senate Bill No. 6637 entitled:

"AN ACT Relating to limitations on growth management hearings board discretion;"

Substitute Senate Bill No. 6637 clarifies the statutes dealing with the Growth Management Hearings Boards.

Sections 1 and 2 of this bill are simple clarifications of current law governing board actions and are not controversial. Section 4 provides for expedited judicial review of board actions in cases in which a board issues a determination of invalidity and such a determination is appealed. While the authority of the legislature to direct the courts to expedite review is not clear, it is reasonable to encourage prompt consideration by the courts of such board actions within their civil dockets given the significant impacts that may be involved in the invalidation of local land use ordinances.

Section 3 of this bill has two major elements, one changing provisions regarding invalidity, the other addressing how courts should review board decisions.

The legislature acted in 1995 to respond to uncertainty regarding the vesting status of projects in jurisdictions in which boards had found comprehensive plans or development regulations out of compliance with the Growth Management Act. Prior to 1995, there was concern that the result might be an effective moratorium on development. The legislature provided that projects vest under a local land use statute, even if it has been found out of compliance, unless and until a board issues a determination of invalidity. Such a determination must meet a higher standard than is needed to find noncompliance. For a board to issue a determination of invalidity, it must find that the continued validity of the plan or regulation would "substantially interfere with the fulfillment of the goals" of the act. After a determination of invalidity, new projects vest under whatever ordinance is eventually adopted in compliance with the act.

Since this change in 1995, there has been significant controversy regarding the use of this authority by the boards. Some have argued that boards have used the authority to respond to repeated refusal by a small minority of local governments to pass statutes that complied with the act. Others have argued that the use of this power has created temporary chaos rather than greater certainty and that the use of this power has altered the "bottom up" nature of growth planning. The legislature responded by revisiting the 1995 sections in this bill.

Substitute Senate Bill No. 6637 requires that when a board makes a determination of invalidity, it must specify the provisions to which the determination would apply and must wait ninety days before effectuating the order. Additional time must be granted to the local government if it is making "substantial progress" toward adopting a plan or regulations.

During this period, all projects vest to the local ordinance which has been found to substantially interfere with fulfillment of the goals of the act. After this period, the board may issue an order effectuating the determination of invalidity. When such an order is issued, it provides that divisions of land vest to new ordinances ultimately found in compliance by the boards. Other development continues to vest to the provisions which have been found invalid by the boards, until new ordinances have been enacted. The concept that projects should vest to provisions of law that substantially interfere with fulfillment of the goals of the act is not wise.

This was an honest attempt to develop a compromise in a difficult area of the law. I commend the legislature for its efforts, but as drafted, Substitute Senate Bill No. 6637 is not without significant flaws.

To permit vesting to a plan or regulation that has been found to substantially interfere with fulfillment of the goals of the act is an incentive for local governments to continue to remain out of compliance with legitimate board orders. Despite the local nature of growth planning, the act reflects statewide concerns. The boards are intended to ensure that local solutions remain within the requirements and goals of the act. If board determinations are ignored, the boards are nothing more than a time-consuming annoyance on the way to court. Meanwhile traffic congestion worsens, sprawl continues, air quality degrades, habitat is lost, the public's ability to pay for infrastructure is strained and frustration mounts.

The section also provides that in appeals of Growth Management Hearing Board decisions, the court is to conduct an independent review of the board's legal conclusions. It is unclear whether this merely clarifies the current court practice of independently reviewing the actions of quasi-judicial boards as to their legal conclusions or whether it directs the courts to grant no deference to the board's specialized expertise. At best, this lack of clarity makes the court's task in reviewing board decisions more difficult than would already be the case. At worst, these provisions render the decisions of the boards meaningless and prolong the resolution of underlying dispute.

I am aware of criticism of a few board actions, but in the vast majority of the appeals brought to the boards, they have been successful in achieving prompt resolution of the issues in dispute. The boards were established to resolve difficult land use planning disputes, including those between local governments, to reflect regional differences, to bring more expertise to these issues, and to resolve issues more quickly than court action would require.

I believe that this provision is a message by the legislature to the boards directing them to use discretion in their authority to invalidate local ordinances. I echo this message. There are some situations in which local actions are so far out of compliance with the requirements and goals of the act that severe action is appropriate. However, overuse of this authority will only serve to weaken both the authority of the boards and the act itself.

I am requesting that the Land Use Study Commission, established in 1995, make recommendations to the 1997 Legislature

and to the governor proposing how to clarify and simplify the law in this area. Such recommendations should propose how to establish greater certainty in local growth planning and encourage local planning and actions to comply with the requirements and goals of the Growth Management Act.

Section 5 of Substitute Senate Bill No. 6637 recognizes the broad range of discretion that may be exercised by local governments under the Growth Management Act. In the act, the legislature specified a set of goals and a related series of procedural and substantive requirements towards achieving them. While requiring compliance, the legislature recognized the diversity of the state and the power inherent in local land use decision-making. Consistent with these requirements, local governments retain broad discretion.

However, local discretion must be exercised in a manner that is consistent with the requirements of the act. The boards have the difficult responsibility of interpreting the legislative meaning of the act in specific local disputes without substituting their judgment for that of local governments. This is among the most difficult challenges facing the boards and local governments.

Section 5 of this bill states that the boards are not to prioritize, balance or rank the goals of the Growth Management Act. This provision appears to prevent the boards from evaluating whether local governments have been guided by the goals or whether, in meeting the requirements of the act, they have reflected the value content of the goals. Such a limitation would reduce the boards to a purely procedural role. If this provision were to become law, most local disputes would require court action for resolution. The boards can only function effectively if they have the authority, when resolving disputes, to ensure that local governments are complying with the requirements and not substantially interfering with fulfillment of the goals of the act.

This section also clarifies that in cases heard by Growth Management Hearings Boards, the burden of proof is on the petitioner. This principle was understood at the establishment of the boards. The boards have adopted rules which include this standard.

Section 5 of Substitute Senate Bill No. 6637 clarifies the standard of review to be used by the boards to judge cases. In matters of law, the bill directs the boards to find compliance unless they find that a state agency or local government erroneously interpreted the chapter. In issues of fact, compliance is to be found if the action of the state agency or local government is not supported by evidence that is substantial when reviewed in light of the whole record before the board.

In reviewing legal questions, the boards must determine whether local governments have been right or wrong in their legal interpretation of the provisions of the Growth Management Act as evidenced by their application of the act. The standard for reviewing questions of fact directs the boards to defer somewhat to local governments as long as they present enough evidence to allow a reasonable person to act. This is similar to the direction by the boards to local governments to "show your work", stating that local governments deserve deference if they establish a rational basis

for making complex land use decisions.

I believe the boards should grant deference to local governments in how they plan for growth consistent with the requirements and goals of the act. Local comprehensive plans and development regulations require local governments to balance priorities and options for action in full consideration of local circumstances. While the act requires that local action take place within a state framework, the local land use process is not aimed at perfection but at allowing local communities to make choices about their future.

The legislature attempted to clarify the standard that boards must use to resolve disputes between local governments and affected parties. With one exception, I believe that they succeeded. However, the prohibition against board action regarding the goals of the act appears to prevent the boards from ensuring that the goals have their intended effect. I cannot approve this. After six years, implementation of the act is forcing us again to consider how to maintain local control within a framework of state goals and requirements. In many jurisdictions, plans have been adopted and many are fully involved in implementing their plans. In these jurisdictions, we can see the results of good planning. But in some jurisdictions, the distance between traditional development patterns and practices and the dramatic changes required by the act have divided communities and resulted in angry disputes between local governments and the boards.

People acting in good faith have come to very different conclusions about how best to manage growth. The state must revisit the issue of how to resolve these disputes. I am requesting that the Land Use Study Commission make recommendations to the legislature and to the governor regarding improvements to our dispute resolution structure.

For these reasons, I have vetoed sections 3 and 5 of Substitute Senate Bill No. 6637.

With the exception of sections 3 and 5, Substitute Senate Bill No. 6637 is approved.

Respectfully submitted,
Mike Lowry
Governor