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### 1.0 Law & Legal CLE Credit – A/V #1044510

**Recording Date** – March 1, 2017

**Recording Availability** – August 4, 2017

Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	<b>Wednesday, March 1, 2017</b>	12:00 PM to 1:15 PM	A Conceptual Framework of Washington Land Use Law and Recent Highlights

#### AGENDA

**12:00 PM** Introductions/Lunch

**12:10 PM** Presentation: ‘A Conceptual Framework of Washington Land Use Law and Recent Highlights’, by Dick Settle, Foster Pepper PLLC

- A graphic outline of the major components of WA land use law.
- Brief Explanation of the major components and their interrelationships.
- Recent trends in the decisions of quasi-judicial state hearings boards and the Courts.
- Highlights of major recent court decisions.

**1:15 PM** Evaluations & Adjourn

#### SPEAKER BIOGRAPHY:

**Dick Settle, Foster Pepper PLLC** - Richard L. Settle, Professor of Law, Seattle University (formerly University of Puget Sound) School of Law from 1972 to 2002, now is Professor of Law Emeritus at the Law School, teaching and lecturing in land use, environmental, administrative and property law on an occasional basis. He has been of counsel with Foster Pepper PLLC since 1985 and continues to actively practice land use, environmental, administrative and municipal law representing a wide variety of clients, consulting with public and private law offices, serving as expert witness, and mediating disputes. He has written numerous articles and papers on land use and environmental law, including Washington’s Growth Management Revolution Goes to Court, 23 Seattle U. L. Rev. 5 (1999); The Growth Management Revolution in Washington: Past, Present, and Future, 16 U. of Puget Sound L. Rev. 867 (1993); Regulatory Taking Doctrine in Washington: Now You See It, Now You Don’t, 12 U. Puget Sound L. Rev. 339 (1989). He is the author of two treatises: WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE (Butterworth Legal Publishers, 1983); and THE WASHINGTON STATE

ENVIRONMENTAL POLICY ACT, A LEGAL AND POLICY ANALYSIS (1987, 1990-2016 annual revised editions). He has been an active member of the Environmental and Land Use Law Section of the WSBA: Editorial Board (2006 to present); Executive Board (1979-1985); Chairperson-elect, Chairperson, and Past-chairperson (1982-1985); and Co-editor of the Environmental and Land Use Law Newsletter (1978-1984). Recently, he was Co-Lead of the Washington State Climate Action Team SEPA Implementation Working Group (2008-2009) and also served on the Advisory Committee on SEPA and Climate Change Impacts to the Washington State Department of Ecology (2010-2011). Most recently, he has served as a member of the Department of Ecology SEPA Rulemaking Advisory Committee established by the 2012 Legislature in 2ESSB 6406.

## **HOW DO I EARN CREDIT FOR SELF-STUDY OR AUDIO/VISUAL (A/V) COURSES?**

For pre-recorded A/V (self-study) programs, although the sponsor should apply for accreditation, **lawyers need to report the credits earned for taking the course.**

To add an approved course to your roster, follow the procedures below:

- ❖ Go to the "mywsba" website at [www.mywsba.org/](http://www.mywsba.org/).
- ❖ Log in.
- ❖ Click on the "Access MCLE" link in the "MCLE Info" box on your home profile page.
- ❖ Click on "Add Activity." Search to find the approved course in our system. (See search suggestions on the screen.)

### **Adding a Recorded Course**

Select Recorded Course from the Add New Activity screen.

This will prompt you to search for the activity in case the activity has already been accredited in the MCLE system.

You can search by Activity ID or by specific Activity Details. For the Activity Details search, you can use keywords for the title, sponsor name and date.

After entering your search criteria and selecting Search at the bottom of the screen, a list of possible activities will be provided.

You can select the correct one by clicking the Activity ID. This will take you to the specific activity. Entered the date(s) on which you began and ending viewing this recorded activity.

Then claim the correct credits for which you attended this activity in the Credits Claimed fields and click the Submit button at the bottom of the page.

You will receive a confirmation message at the top of your screen stating, "The activity has been added to your roster."

KING COUNTY BAR ASSOCIATION  
REAL PROPERTY PROBATE & TRUST LAW  
MARCH SECTION MEETING  
MARCH 1, 2017

Conceptual Framework for Washington Land  
Use Law and Recent Significant Cases



# PRE-1970 LOCAL LAND USE PLANNING AND REGULATION

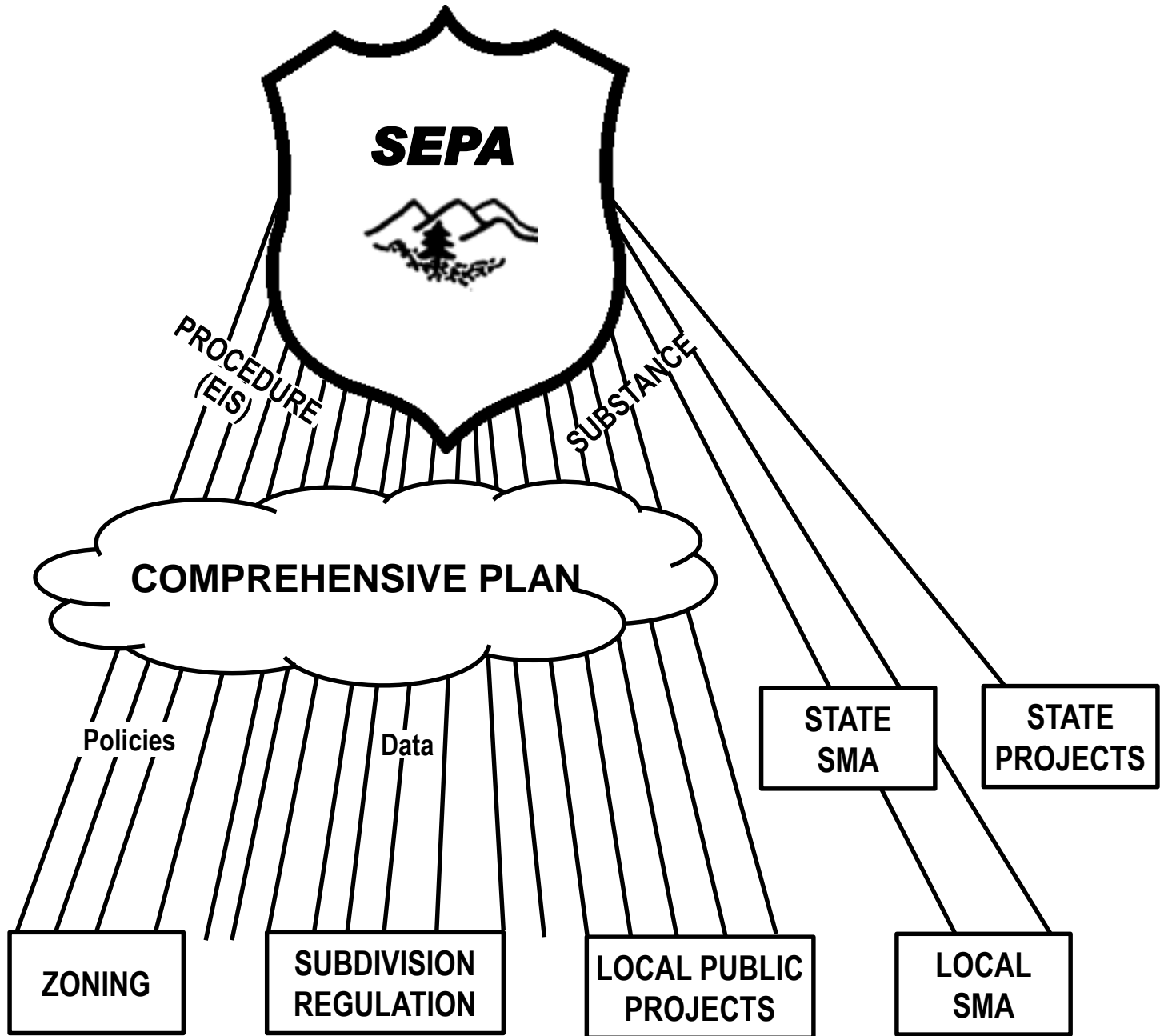
**COMPREHENSIVE PLAN  
(MAYBE)**

**Land Use Regulation**

**Public Facilities**

**Zoning  
(Probably)**

**Subdivision  
Regulation  
(Yes)**



**SEPA**



PROCEDURE  
(EIS)

SUBSTANCE

**COMPREHENSIVE PLAN**

Policies

Data

**ZONING**

**SUBDIVISION  
REGULATION**

**LOCAL PUBLIC  
PROJECTS**

**STATE  
SMA**

**STATE  
PROJECTS**

**LOCAL  
SMA**

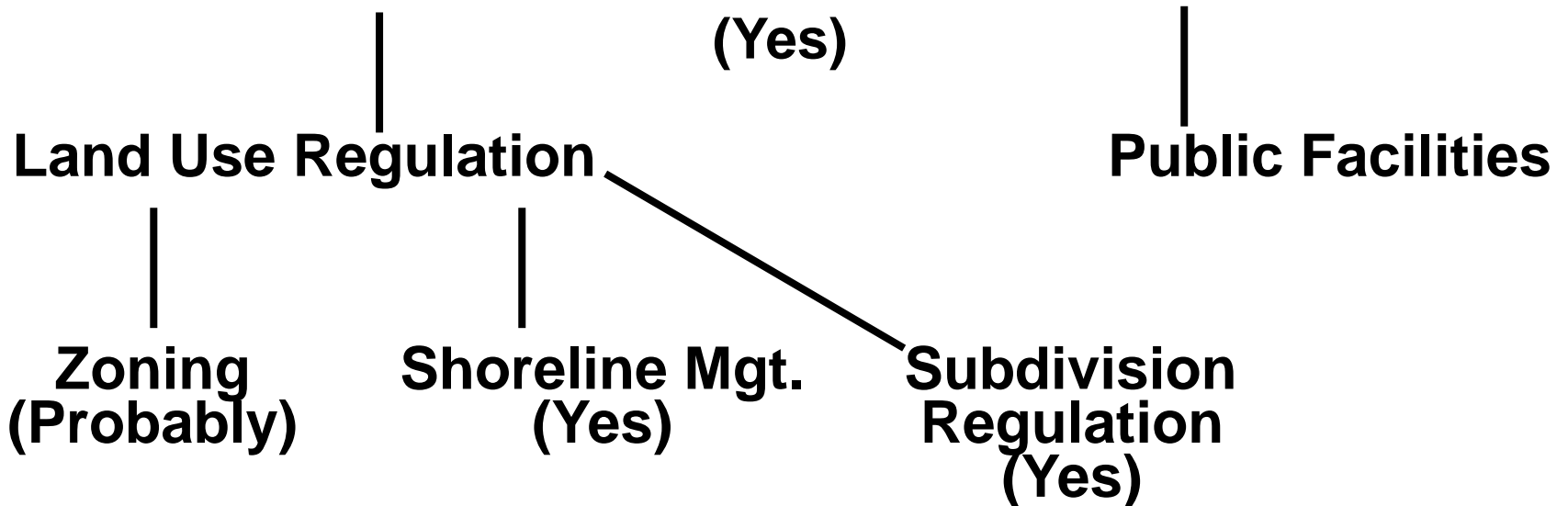
# PRE-GMA LOCAL LAND USE PLANNING AND REGULATION

## SEPA



## COMPREHENSIVE PLAN (Maybe)

## SHORELINE MASTER PROGRAM (Yes)



# POST-GMA LOCAL LAND USE PLANNING AND REGULATION (GMA Counties and Cities)

## SEPA

|                      |  
Procedural Mandate      Substantive Authority

COMPREHENSIVE PLAN  
(Yes – GMA Compliant)

SHORELINE MASTER PROGRAM  
(Yes – Integrated with GMA Plan and Regulations)

Consistency Requirement


Land Use Regulation — GMA Concurrency Requirement — Public Facilities  
(GMA Compliant)

(“Development Regulations”  
includes zoning, subdivision  
regulation, shoreline regulation.  
Must be GMA Compliant)



# New Constitutional Limitations on Sign Regulations

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## Local Sign Code Subject to Strict Scrutiny and Invalidated under Constitutional Free Speech Guaranties: Sweeping New Limitations on Local Sign Regulations.

Reed v. Town of Gilbert, Arizona, 2015 WL 2473374, 135 S. Ct. 2218  
(June 18, 2015)

- Only “Time, Place and Manner of Signs May be Regulated.
- Must be Content Neutral.
- Most Sign Codes Fail these Tests.

# Wetland Regulation Decisions

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SCOTUS holds Clean Water Act § 404 Wetland “Jurisdictional Determination (JD)” is Subject to Judicial Review as a “final agency action for which there is no other adequate remedy in a court.”

*United States Army Corps of Engineers v. Hawkes Co. Inc.*, No. 15-290, U.S. Supreme Court (May 31, 2016)

- Previously, Landowner who disagreed with JD could either disregard risking civil and criminal penalties OR go through long costly § 404 permit process and then challenge the JD.
- Wheels of Justice Turn Very Slowly.

# Shoreline Management and Public Trust Doctrine Decision


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Shoreline Management Act (SMA) Savings Clause  
Immunizes Existing Fills from SMA Regulation and  
Abatement Under Public Trust Doctrine.

SMA Savings Clause does not Violate the Public Trust  
Doctrine or Constitutional limitations.

*Chelan Basin Conservancy v. GBI Holding Co.*, 33196-2-III, 2016 WL 3361470  
(Wash. Ct. App. June 14, 2016)

- Public Trust Doctrine Spawned the SMA
- Bedrock SMA principle unsuccessfully challenged under Public Trust Doctrine.



## Creation of Undevelopable Lot by City's Boundary Line Adjustment Was Not a Regulatory Taking.


*Kinderace LLC v. City of Sammamish*, \_\_\_ Wash.App. \_\_\_, \_\_\_ P.3d \_\_\_

(July 5, 2016)

- Where undevelopable lot is deliberately created, no Regulatory Taking,
- Value had been generated before boundary adjustment.

# Vested Rights: Ecology Stormwater Permit Upheld

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## Regulatory Requirements Imposed by Local Governments to Comply with Ecology Stormwater Permit Not Subject to Vesting Statutes.

*Snohomish County v. Pollution Control Hearings Board*, \_\_ Wn.2d \_\_, 386 P.3d 1064, 2016 WL 7495874 (December 29, 2016)

- Regulatory Scheme: Federal—State—Local.
- Permit Forced local Governments to impose onerous new “low impact development” standards on otherwise vested development.
- Not subject to vested rights statutes.
- Major Ramifications for WA Vested Rights Law

# Restrictive Interpretation of Subdivision Vesting Statute

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## Significant New Limitation on Vested Rights under the Subdivision Vesting Statute, RCW 58.17.033.

*Alliance Investment Group of Ellensburg v. City of Ellensburg*, \_\_ Wn.App. \_\_, \_\_P.3d \_\_ (August 25, 2015)

- This COA Division 1 Case Conflicts with earlier Division 2 Case, *Westside Business Park v. Pierce County*.
- Plat application vests rights only in proposed use of lots under RCW 58.17.330.
- Plat application does not vest rights in existing critical area ordinance, subjecting landowner to onerous new critical area regulations.

# Encroaching Tree Roots May Be Cut

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Landowner has Absolute Right to Sever Tree Roots Encroaching from Adjoining Land without any Duty to Exercise Reasonable Care.

*Jennifer Mustoe v. Kiaoye Ma and Anthony Jordan*, \_\_ Wn.App. \_\_, \_\_P.3d \_\_  
(April 4, 2016)

- Landowner may cut intruding roots or limbs at property line.
- No duty to use care to avoid harming or killing tree.



## Unprecedented Judicial Enforcement of Substantive SEPA Mandate.

*Puget Soundkeeper Alliance v. Washington State Pollution Control Hearings Board*, \_\_ Wn.App. \_\_, \_\_P.3d \_\_ (July 28, 2015)

- RCW 43.21C.030(1): state policies, regulations, and laws shall be interpreted and administered in accordance with SEPA Policies.
- Ecology Clean Water Permit violated broad SEPA policies.
- Sweeping potential ramifications.





## All Terrain Vehicle Wars:

*Conservation Northwest v. Okanogan County*, Wash. Court of Appeals, Division 2, 2016 WL 3453666 (2016)

- Okanogan County, as allowed by state law, passed ordinance allowing All Terrain Vehicle (ATV) operation on county roads.
- Environmental groups argued SEPA Checklist for Ordinance was inadequate. Majority of Court (2-1) agreed.
- Longest SEPA decision ever written (“painfully long” according to author of the decision).
- Unpublished, but new status for unpublished decisions of COA.

# Ocean Resources Management Act Decision


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**Ocean Resources Management Act: *Quinault Indian Nation v. Imperium Terminal Services, LLC*, \_\_\_ Wn.2d.\_\_\_, 387 P.3d 670 (2017) WL 121545 (January 12, 2017)**

- SEPA Challenge of Proposed expansion of fossil fuel storage and transport facilities in Grays Harbor.
- Case of First Impression on Ocean Resources Management Act.
- Applies only to Ocean Coastal Counties and Cities.

# Development Regulation by Voters

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## Pre-Election Invalidation of Ballot Initiative to Amend Spokane City Charter with Provisions Imposing New Requirements on Zoning Changes for Major Developments and Water Rights

*Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, 2016 WL 455957 (February 4, 2016)

- Ballot Initiative would require voter approval of zoning changes for major developments in City and make major changes in water law.
- Supreme Court held these provisions were beyond local initiative authority.



## Land Use Litigation Trap for the Unwary:

*Schnitzer West, LLC v. City of Puyallup*, 196 Wn.App. 434, 382 P.3d 744

(October 18, 2016)

- Overlay regulations imposed only on lots owned by Schnitzer were held not to be “land use decisions” that could be challenged under LUPA.
- **Lesson:** Mistake in choosing means of obtaining local administrative, judicial, and/or Growth Management Hearings Board review of local land use actions can be fatal. Risk may be avoided by seeking review through multiple pathways.

FOSTER PEPPER PLLC