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COURT OF APPEALS
DIVISION II

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NO. 38727-1-II

STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CLALLAM COUNTY BOARD OF COUNTY COMMISSIONERS, a
political subdivision of the State of Washington; and WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Appellants,

v.

ELOISE KAILIN; HARVEY KAILIN TRUST; AND ELOISE KAILIN,
AUTHORIZED DESIGNEE OF NANCY SCOTT, TRUSTEE OF
HARVEY KAILIN TRUST,

Respondents.

**REPLY BRIEF OF APPELLANT WASHINGTON STATE
DEPARTMENT OF ECOLOGY**

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I. INTRODUCTION

The key issue before this Court is whether the superior court properly interpreted the Supreme Court's decision in *Futurewise* when it remanded Dr. Kailin's case to the Shorelines Hearings Board (Shorelines Board or Board). In their opening briefs, the Department of Ecology (Ecology) and Clallam County (County) analyzed the *Futurewise* decision and concluded that the holding of the case was reinstatement of the decision of the Western Washington Growth Management Hearings Board (Growth Board). The Growth Board decision held that critical areas ordinances adopted after the passage of Engrossed Substitute House Bill (ESHB) 1933 were *de facto* amendments to shoreline master programs that needed to be reviewed and approved by Ecology before they become effective.

Dr. Kailin does not refute the interpretation of the *Futurewise* decision presented by Ecology and Clallam County. Instead, she cites to a series of cases that are irrelevant to the current dispute. She also cites to an inapplicable definition of "shorelands" in the Shoreline Management Act for the proposition that the critical area on her property cannot be regulated because Ecology did not designate it as "shoreland" under this definition.

The superior court's decision in *Kailin* contradicts the *Futurewise* decision because it directs the Shorelines Board to consider a permit decision made under a critical areas ordinance that was neither adopted after ESHB 1933 nor reviewed and approved by Ecology. For that reason, the superior court's order is erroneous and should be reversed.

II. AUTHORITY AND ARGUMENT

A. Resolution of This Case Requires an Analysis of the Supreme Court's Decision in *Futurewise v. City of Anacortes*, Which *Dr. Kailin* Does Not Provide

The key question in this case involves proper interpretation of the Supreme Court's decision in *Futurewise v. Western Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 189 P.3d 161 (2008), which is the only decision on point with the issue in this case. The *Futurewise* decision was the basis of the superior court's order of remand to the Shorelines Board, from which this appeal is taken. CP at 25-29. Ecology and the County analyzed the case in detail in their opening briefs to this Court. Ecology's Opening Br. at 2, 9-10, 12-13, 14-19; County's Opening Br. at 3-4. Both Ecology and the County concluded that, contrary to the superior court's conclusion, the only possible "holding" of the case is reinstatement of the Growth Board's decision.

The Growth Board's decision held that critical areas ordinances updated after passage of ESHB 1933 must be reviewed and approved by

Ecology as shoreline master program amendments before they become effective; and conversely, that critical areas ordinances not updated since the passage of ESHB 1933 are not automatically incorporated into shoreline master programs. CP at 250-256; Engrossed Substitute H.B. 1933, 58th Leg., Reg. Sess. (Wash. 2003). In this case, Clallam County has not updated its critical areas ordinance since the passage of ESHB 1933. As a result, the County's critical areas ordinance is not incorporated into its shoreline master program and the Shorelines Board lacks jurisdiction to hear an appeal of decisions made under that ordinance.

Dr. Kailin offers no analysis of the *Futurewise* decision. Instead, she focuses on cases that are irrelevant to this appeal because none of the cases she cites involve regulation of critical areas or the intersection of the Growth Management Act with the Shoreline Management Act.

First, Dr. Kailin cites *Harrington* for the proposition that “where activity occurs on a shoreline, and a shoreline permit is required, the Shoreline Hearings Board is the final determiner of all of the land use regulations applicable to the property, and specifically that LUPA is not applicable.” Resp't's Br. at 6, citing to *Harrington v. Spokane Cy.*, 128 Wn. App. 202, 114 P.3d 1233 (2005). Contrary to this statement, *Harrington* simply stands for the unremarkable proposition that permit decisions within the jurisdiction of the Shorelines Board are to be

reviewed by that Board under the Shoreline Management Act, not the Land Use Petition Act (LUPA). *Harrington*, 128 Wn. App. at 213-15. It does not address the issue in this case, involving the Board's jurisdiction to review a critical areas permit decision. It also cannot be read for the proposition that a critical areas permit is to be reviewed under the Shoreline Management Act rather than LUPA because it simply did not address the regulation of critical areas.

Next, *Twin Bridge Marina*, cited by Dr. Kailin, held that Ecology needed to appeal a building permit under LUPA rather than pursue an enforcement action under the Shoreline Management Act for construction that occurred in compliance with a valid building permit. *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825, 843-47, 175 P.3d 1050 (2008). This was an extension of the Court's prior decision in *Samuel's Furniture*, which held that Ecology is required to file a LUPA petition to challenge a local government's land use decision when the local government has determined that the project is not within shoreline jurisdiction. *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 444, 54 P.3d 1194 (2002). Neither case is helpful to Dr. Kailin because they make it clear that LUPA is the appropriate avenue for challenge of a land use decision that does not fall squarely under the

Shoreline Management Act, even if the decision impacts land within shoreline jurisdiction.

The *English Bay* decision addressed the issue of whether clam harvesting which involves dredging constitutes “substantial development” as defined by the Shoreline Management Act. Resp’t’s Br. at 8, citing to *English Bay v. Island Cy.*, 89 Wn.2d 16, 568 P.2d 783 (1977). The Court concluded that the activity did constitute substantial development, thereby giving the Shorelines Board jurisdiction over such activity. *See generally id.* Again, this is not relevant to the current dispute because the current dispute does not involve the Board’s jurisdiction over substantial development within the shoreline, but rather, a critical areas permit decision made under the County’s critical areas ordinance.

Last, the *Biggers* case addressed the legality of a rolling moratorium on dock construction imposed by the City of Bainbridge Island. Resp’t’s Br. at 20-21, citing to *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007). Dr. Kailin cites it as authority for the proposition that “[a]rea[s] in shoreline jurisdiction must be regulated only as the State has specifically authorized.” Resp’t’s Br. at 20. However, she erroneously rests her conclusion on the reasoning of the plurality opinion that did not receive five votes.

In *Biggers*, a four justice plurality concluded that local governments lack statutory or constitutional authority to adopt shoreline moratoria and, thus, found the moratorium in the case to be invalid. *Biggers*, 162 Wn.2d at 685-702. A four justice dissent concluded that local governments have constitutional police power authority to adopt moratoria and, further, that the City's moratorium was reasonable and valid. *Id.* at 707-12. In a concurring opinion, Justice Chambers agreed with the dissent that local governments have constitutional police power to adopt moratoria and that the exercise of such power does not conflict with the Shoreline Management Act. *Id.* at 702-06. However, Justice Chambers agreed with the result of the plurality insofar as he concluded that the moratorium in this case was invalid because it was unreasonable. *Id.* at 706.

Like the *Futurewise* decision, *Biggers* is a split 4-1-4 decision. However, unlike *Futurewise*, the concurring justice wrote an opinion that explicitly agreed with the reasoning of the dissent and disagreed with the plurality's reasoning. *Biggers*, 162 Wn.2d at 702-06. Thus, it is actually the concurring opinion in the case that constitutes the holding of the case because that opinion represents the narrowest possible ground for the judgment of the court (i.e., invalidation of the moratorium). *See W.R. Grace & Co. v. Dep't of Rev.*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999)

(holding of court is position of justices concurring on narrowest possible grounds); *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d (1977) (when no single rationale garners five votes, the holding of the court is the position taken by members who concurred in the judgment on the narrowest grounds). At any rate, this decision is also not on point.

By failing to address the central case before the Court, Dr. Kailin has not effectively refuted the argument that the Shorelines Board lacks jurisdiction over a permit decision issued under the County's critical areas ordinance. The superior court erred by failing to appreciate that the County's critical areas ordinance has never been reviewed and approved by Ecology nor has it been updated since the passage of ESHB 1933. However, the Growth Board decision is clear that a critical areas ordinance becomes part of a master program only, (1) if updated after the passage of ESHB 1933; and (2) after Ecology has reviewed and approved it. Because these prerequisites are absent in Dr. Kailin's case, the superior court's decision should be reversed and the decision of the Shorelines Board should be affirmed.

B. Dr. Kailin Overstates the Scope of the Shoreline Management Act and Asks for Relief that Differs from the Superior Court's Order of Remand

Dr. Kailin asserts that "[t]he Shoreline Master Program preempts all other regulation." Resp't's Br. at 12. This is incorrect. In fact, several

other types of regulations apply to development within shoreline jurisdiction, in harmony with any shoreline master program that applies. For example, local governments apply their zoning ordinances, subdivision ordinances, building codes, and comprehensive plans to development within and without shoreline jurisdiction. *See, for example*, RCW 36.70A.030(7) (defining types of development regulations); RCW 36.70A.320(5) (recognizing the existence of a “shoreline element” in comprehensive plans); RCW 90.58.080(4) (requiring a local government to review its shoreline master program to assure consistency of the master program with the comprehensive plan and other development regulations). *See also* RCW 90.58.360 (Shoreline Management Act does not preempt other permits); *City of Bremerton v. Sesko*, 100 Wn. App. 158, 162-63, 995 P.2d 1257 (2000) (upheld application of zoning ordinance that was stricter than the applicable shoreline master program). Additionally, local governments may impose regulations through their constitutional police powers without running afoul of the Shoreline Management Act or other state laws. *Weden v. San Juan Cy.* 135 Wn.2d 678, 690-98, 958 P.2d 273 (1998) (upholding ban on personal watercraft in marine waters and lakes).

Next, although Dr. Kailin did not cross-appeal the superior court’s order of remand, she asks this Court to provide different relief by arguing that the remand was unnecessary. Resp’t’s Br. at 28-30. She similarly

argued below that remand was unnecessary, a position that the superior court rejected when it remanded to the Shorelines Board. CP at 298-314.

In addition to arguing for a different result, Dr. Kailin misconstrues the superior court's ruling by stating that the court remanded "to determine whether the County's critical areas ordinance, having not been incorporated into the Department of Ecology-approved Shoreline Master Program of the County, was a valid Shoreline regulation." Resp't's Br. at 26. In fact, the court remanded "for further hearings" because it found that the Board had erroneously concluded that it lacks jurisdiction to "determine compliance with Clallam County's Critical Areas Ordinance" CP at 28. In other words, the court remanded so that the Shorelines Board could determine compliance with the critical areas ordinance. The court did not instruct the Board to determine whether the ordinance was valid.

Because Dr. Kailin did not cross appeal, this Court may disregard her arguments in support of a result other than remand. *DeBlasio v. Town of Kittitas*, 57 Wn.2d 208, 212, 356 P.2d 606 (1960) (court refused to address issue of whether trial court should have granted interest on judgment when respondent did not cross appeal). *See also State v. Stritmatter*, 25 Wn. App. 76, 80, 604 P.2d 1023 (1979) (declining to reach issues in defendant's brief when defendant did not cross appeal).

However, even if the Court does reach the arguments, the Court should conclude that the remand was improper not for the reasons advanced by Dr. Kailin, but because the Shorelines Board lacks jurisdiction over the County's critical areas decision.

C. The Fact that Ecology Did Not Map the Critical Area on Dr. Kailin's Property Under RCW 90.58.030(2)(f) is Irrelevant to the Issue of the Board's Jurisdiction Over a Critical Areas Permit Decision

Dr. Kailin argues that the wetland on her property cannot be regulated because Ecology did not "designate as to location" the wetland under RCW 90.58.030(2)(f) (definitional statute of "shorelands"). Resp't's Br. at 15-25. Dr. Kailin raised the same arguments to the Board, which were rejected in the Board's conclusion of law number thirteen:

The Board is not persuaded by this argument, nor does it interpret the [Shoreline Management Act] as suggested by the petitioners. RCW 90.58.030 is a definitional statute. It designates Ecology as the agency with authority to make such determinations as may be necessary to implement and enforce the provisions of the [Act]. Petitioners present no authority to support their contention that Ecology is statutorily *required* to identify every wetland in the state. Indeed, such an obligation would be unrealistic and impractical. It would be extremely burdensome and, ultimately, a fruitless exercise. Both upland and shoreline wetland areas constantly evolve and change over time, a fact amply demonstrated by the physical conditions on the Kailin site. Finding no authority for such a requirement, the Board rejects the suggestions that, because it has not previously been delineated on a map by Ecology, the wetland that is obviously present on the Kailin property does not exist.

CP at 76. *See also* testimony of Ecology employee and Certified Professional Wetland Scientist, Perry Lund, Certified Appeal Board Record (CABR) at 1450-51 (“We have not designated and mapped wetlands across the state. The sheer magnitude of that effort is unimaginable.”); Testimony of County Planning Manager, Steven Gray, CABR at 1511-12, 1526 (designation of wetlands has to occur in the field rather than by reference to a map).

Dr. Kailin renewed the same arguments in superior court. The court implicitly rejected these arguments when it remanded to the Board to determine compliance with the critical areas ordinance and did not reverse the Board’s conclusion of law. Because Dr. Kailin did not cross appeal, this Court should decline to reach her arguments on this issue. However, even if the Court reaches the arguments, the Court should reject the position taken by Dr. Kailin because it is contrary to the plain language of the relevant statutory provisions.

As noted in Ecology and the County’s opening briefs, provisions of ESHB 1933 that were codified in the Growth Management Act and Shoreline Management Act are directly on point in this dispute. The relevant Growth Management Act provision states, in pertinent part:

As of the date the department of ecology approves a local government’s shoreline master program adopted under

applicable shoreline guidelines, the protection of critical areas *as defined by RCW 36.70A.030(5)* within shorelines of the state shall be accomplished only through the local government's shoreline master program and shall not be subject to the procedural and substantive requirements of this chapter, except as provided in subsection (6) of this section.

RCW 36.70A.480(3)(a) (emphasis added).

“Critical areas” as defined by RCW 36.70A.030(5) includes:

(a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.^[1]

The process for designation of critical areas by local governments is set forth in RCW 36.70A.060 and .170. *See also* Clallam County Code 27.12.210 (Clallam County's designation of wetlands within its jurisdiction), <http://www.codepublishing.com/WA/clallamcounty.html>.

The Shoreline Management Act similarly refers to critical areas as defined by RCW 36.70A.030(5):

The department [of ecology] shall approve the segment of a master program relating to critical areas *as defined by RCW 36.70A.030(5)* provided the master program segment is consistent with RCW 90.58.020 and applicable shoreline guidelines, and if the segment provides a level of protection of critical areas at least equal to that provided by the local government's critical areas ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).

RCW 90.58.090(4) (emphasis added).

¹ Dr. Kailin's property contains both a regulated wetland and a Class I Aquatic Habitat Conservation area. CP at 65.

The question presented by Dr. Kailin's case is what forum has jurisdiction over a *critical areas* permit decision. The definition of "shorelands" in RCW 90.58.030(2)(f) does not address this question. Specifically, the definition does not purport to define critical areas and, as noted above, the two relevant statutes are clear that when the term "critical areas" is used, it applies to critical areas as defined under the Growth Management Act. Indeed, when reviewing the entire definition of "shorelands," it is clear that the term "critical areas" applies to critical areas under the Growth Management Act: "Any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state" RCW 90.58.030(2)(f)(ii) (emphasis added).

As the Shorelines Board noted, Dr. Kailin's reliance on the definition of "shorelands" is misplaced. Furthermore, the conclusion she draws from this erroneous reliance is flawed. She takes the position that if any permit criteria apply to the critical area on her property, it is Ecology's criteria for shoreline variances under WAC 173-27-170. Resp't's Br. at 13-15, 24-25. She then concludes that, since her proposed development is landward of the ordinary high water mark, it is authorized by a portion of the variance language "which provides essentially that a reasonable use shall be permitted" Resp't's Br. at 15. In fact, Ecology's variance

criteria, which apply to all shoreline variances, require consideration of seven factors, all of which must be met in order for a variance to be granted. WAC 173-27-170(2) (listing six criteria for variances landward of the ordinary high water mark); WAC 173-27-170(4) (adding an additional criterion for all variances requiring consideration of cumulative impacts). At any rate, this argument by Dr. Kailin is irrelevant and incorrect.

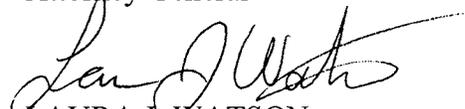
Dr. Kailin has not appropriately raised this issue because she did not cross appeal the superior court's order of remand. However, even if the Court reaches this issue, the Court should reject Dr. Kailin's arguments as contrary to the plain language of the relevant statutes.

III. CONCLUSION

For the reasons stated in its opening brief and this reply brief, Ecology respectfully asks the Court to reverse the superior court's order remanding Dr. Kailin's case to the Shorelines Board, and affirm the Board's conclusion that it lacks jurisdiction to review the critical areas permit decision.

RESPECTFULLY SUBMITTED this 18 day of May, 2009.

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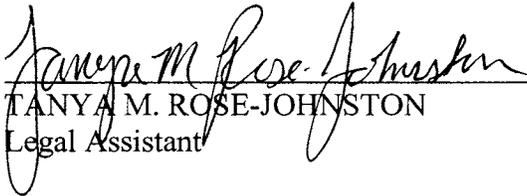
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of May 2009, in Olympia, Washington.


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