

ORIGINAL

No.38727-1-II

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

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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.

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**RESPONDENTS' BRIEF**

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CLALLAM COUNTY

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## INTRODUCTION

This case involves the proposed construction of a single family residence to be located completely within the 200 foot Shoreline Management Act jurisdiction. Nevertheless, Clallam County required the applicant (Eloise Kailin and Kailin Trust, hereinafter “Kailin”) to apply for numerous permissions from the County, including shoreline substantial development permit or exemption, critical areas permit, and a reasonable use exception permit. All the permits were processed at the same time and at the same hearings by the same individuals.

Previous to this, the County had granted a single family residence sewage disposal permit for the property but located outside of the Shoreline jurisdiction and proposed to be tightline piped to that area. The County did grant a reasonable use permit but it was for a substantially abnormal extremely narrow structure. Kailin appealed *the decision*, which consisted of one document, to the Superior Court under the Land Use Petition Act (LUPA) and to the Shoreline Hearings Board under the Shoreline Management Act (SMA).

Because of case scheduling in Clallam County Superior Court, the

Shoreline Hearing Board decision occurred before the LUPA case could be heard. The decision was adverse to Kailin, and Kailin appealed to the Superior Court. The original LUPA which had not yet been heard and the appeal of the Shoreline Hearing Board decision were consolidated.

As a preliminary issue, the Superior Court wanted briefing on the issue of whether there was jurisdiction under LUPA or whether jurisdiction was under the SMA. Just before argument, a decision was rendered in Futurewise v. Western Washington Growth Management Hearings Board, 164 Wn 2d 242, 189 P3d 161 (2008).

Kailin had argued that the Shoreline Management Act was the exclusive statute applicable in shoreline areas. The facts in this case which are relevant to the argument but not disputed are that Clallam County never incorporated its Growth Management Act critical areas regulations into its Department of Ecology-approved Shoreline Master Program.

### **RESPONSE TO ASSIGNMENT OF ERROR**

The error assigned by the State is that the Court entered an order of remand to the Shoreline Hearings Board. The SHB has found that the County's critical areas ordinance is *not* part of its Shoreline Master

Program. The SHB has jurisdiction in the Shorelines area, not the County.

### **ISSUES**

The real issues are:

1. Is a project to be constructed within 200 feet of the shoreline entirely within the jurisdiction of the Shoreline Management Act and subject to review by the Shoreline Hearings Board?
2. Is the County's GMA critical areas ordinance applicable to its Shoreline Master Program or within Shoreline jurisdiction?
3. Did the Department of Ecology ever designate or approve County designations of critical areas? WAC 173-22-050, RCW 90.58.030(2)(f).

### **FACTS CONTAINED IN THE RECORD**

Attached to this brief are factual allegations established by the Shoreline Hearings Board record. A positive statement regarding the fact established by the record is above the quoted language from the record and the page and line referenced to the record as well as the name of the individual is attached. Lund is a state Department of Ecology employee. Gray and Emery are current or former Clallam County employees. Lux is a Department of Ecology employee or former employee. All of the state or

county witnesses were called by the state or county.

**ARGUMENT ON ISSUE NO. 1**

**STATUTES**

RCW 90.58.180 states, “(1) Any person aggrieved by the granting, denying or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 may, except as otherwise provided in Chapter 43.21L RCW seek review from the Shoreline Hearings Board ....”

Further, RCW 90.58.185 provides:

(1) In the case of an appeal involving a single-family residence or appurtenance to a single-family residence, including a dock or pier designed to serve a single-family residence, or appeals involving a penalty of \$15,000 or less, the request for review may be heard by a panel of three Board members  
....

RCW 90.58.100 provides:

The master programs provided for in this chapter, when adopted or approved by the Department, shall constitute use regulations for the various shorelines of the state. In preparing the master programs, and any amendments thereto, the Department and local governments shall ....

RCW 90.58.030(2)(f) provides:

“Shorelands” or “shoreland areas” means

those lands extending landward for 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark ... the same to be designated as to location by the Department of Ecology ....

(ii) 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, provided that forest practices regulated under Chapter 76.09 RCW, except conversions to non-forest land use, on lands subject to the provisions of this subsection (2)(f)(ii) are not subject to additional regulations under this chapter ....

(iii) ... (b) “Master program” shall mean the comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and standards developed in accordance with the policies enunciated in RCW 90.58.020.

RCW 36.70C.010 provides:

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable and timely judicial review.

“Land use decision” is defined in RCW 36.70C.020(1) as:

“Land use decision” means a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals on ....

RCW 36.70C.030 provides:

This chapter ... shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of ...

.....

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasijudicial body created by state law, such as the Shoreline Hearings Board.

#### CASE LAW

The case of Harrington v. Spokane County, 128 Wn App 202, 114 P3d 1233 (2005), stands 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.

Recently, Justice James Johnson wrote the opinion in Twin Bridge Marine Park LLC v. Department of Ecology, 2008 WASC 78462-1-012408 (January 24, 2008). In the last sentence of the first paragraph,

Justice Johnson states,

The Shoreline Management Act of 1971 (SMA), Chapter 90.58 RCW, defines state and local authority to regulate. When disagreements over property development arise between these two entities that exercise regulatory powers under the SMA, private citizens must not be forced to choose between conflicting edicts.

Unfortunately, the Justice then goes on to hold that LUPA applied even though the project was entirely within the shoreline boundary.

Justice Owens dissented, pointing out that the issuance of building permits is not a land use decision that Ecology could appeal, and that Ecology still had the authority to enforce the Shoreline Management Act. Although this is the most recent case on this issue and is binding on the trial court, it is not applicable to the facts in our case because the County agreed that shoreline jurisdiction existed. Unfortunately this case seemed to be more a case where the Supreme Court wanted Ecology to appeal using LUPA for the County's failure to recognize the jurisdiction of the Shoreline Management Act.

Similarly, in Samuel's Furniture v. Ecology, 105 Wn App 278, 19 P3d 474 (2001), Justice Coleman had held that the Shoreline Management Act gave Ecology the authority to review a local government decision on

shorelines. The Supreme Court at 147 Wn 2d 440 at 457 (2002), held that where the Department of Ecology had not challenged a grading permit under LUPA, they were precluded from doing so even though their claim was that a grading permit should not have been granted because the property was within Shoreline jurisdiction. Unfortunately the Samuel's Furniture case had a different set of facts. The approved Master Program that the City as well as Ecology were stuck with did not show the Samuel's Furniture property as being within Shoreline jurisdiction.

In English Bay v. Island County, 89 Wn 2d 16, 568 P2d 783 (1977), the court was construing an only recently adopted Shoreline Management Act (1971). In that case, the court was dealing with an appellant engaged in the business of harvesting clams on tidelands. The entity had received a valid permit from the Department of Fisheries allowing clam harvesting. The court looked to the Shoreline Management Act and in RCW 90.58.140(2) found "No substantial development shall be undertaken on shorelines of the state without first obtaining a permit from the governmental entity having administrative jurisdiction under this chapter." The appellant contended that the Shoreline Hearings Board did not have jurisdiction. The county and the Shoreline Hearings Board said

they did, and the Supreme Court agreed.

Some of the facts in our consolidated cases are common and undisputed. They appear to be as follows:

- 1) The applicant applied for some form of shoreline permit.
- 2) The property involved is entirely within the 200 foot jurisdiction of the Shoreline Management Act.
- 3) Clallam County has a shoreline map approved by the Department of Ecology.
- 4) Clallam County has a Shoreline Master Program approved by the Department of Ecology.
- 5) Clallam County has previously submitted to Ecology, and Ecology has approved by regulation (WAC), additional designations of wetlands and other areas.
- 6) Clallam County's Shoreline Master Program does not contain a critical areas ordinance affecting appellant's property.
- 7) Neither Clallam County's Shoreline Master Program nor Ecology WACs contain a wetland designation designating appellant's property.

- 8) The Department of Ecology has never designated any portion of the appellant's property as containing any wetlands, but has designated the shoreline.
- 9) The County required, as part of the application for a shoreline permit, application for road setbacks as well as variances for alleged critical areas on the property.

The position of the Department of Ecology is that there is no jurisdiction of the Department of Ecology to consider the applicability of any item not contained in a Shoreline Master Program. With this determination appellants agree. However, appellants do not agree that the Shoreline Hearings Board could therefore somehow "affirm" conditions on a permit since the Shoreline Management Act says that it is the exclusive governor of activities in shorelands and the Act goes on to state that counties may make initial determinations based upon their Shoreline Master Program. The Act does not say "together with any other ordinances that they may wish to impose."

The Shoreline Hearings Board has exclusive jurisdiction on the appeal of the County action regarding property entirely within 200 feet of the shoreline.

## ARGUMENT ON ISSUE NO. 2

Clallam County's critical areas ordinance is not part of its Master Program. The statute is clear.

Eloise Kailin, a 90 year old citizen, and the Harvey Kailin Trust sought to build a small single family residence for the owner to reside in on shorelines of the state. Kailin sought a substantial development permit which was processed as an exempt development from a substantial development permit. Kailin also filed a substantial development permit application and paid for it. It was rejected. The original permit application was also denied and no use or variance or reasonable use was permitted. She appealed. Later, she applied for a substantial development permit with a different design and a proposed substantial mitigation offer to the county. The county cut the size of her minimal home nearly in half and demanded all of the mitigation without any showing of a nexus to any "damage" caused by the permitted tiny home.

The second proposed action is a proposal for a shoreline permit. This permit is governed by the Shoreline Management Act of 1971. The findings are set forth in RCW 90.58.020. One portion of that statute states the following:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering *all reasonable* and appropriate uses. ...

The Shoreline Act also is paramount in the regulation of shorelines. The Shoreline Master Program preempts all other regulation. The Shoreline Master Program must be approved by the Department of Ecology. RCW 90.58.100 states in part:

The Master Programs provided for in this chapter, when adopted or approved by the Department, *shall constitute use regulations for the various shorelines of the state.*

Again, in RCW 90.58.140, the state statute says, “A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter and, *after adoption or approval*, as appropriate, the applicable guidelines, rules or Master Program.”

Pursuant to the above statute, the Department has adopted numerous regulations. The ones concerned with this case are primarily found in WAC 173-27, particularly -150 and -170.

WAC 173-27-150, Review criteria for substantial development permits.

(1) A substantial development permit shall be granted only when the development proposed is consistent with:

- (a) The polices and procedures of the act,
  - (b) the provisions of this regulation, and
  - (c) the applicable master program adopted or approved for the area provided that, where no master program has been approved for an area, the development shall be reviewed for consistency with the provisions of WAC 173-26, and to the extent feasible any draft or approved master program which can be reasonably ascertained as representing the policy of the local government.
- (2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act *and the local master program*.

WAC 173-27-170, Review criteria for variance permits.

- (1) The purpose of a variance permit is strictly limited to granting relief from specific bulk, dimensional or performance standards *set forth in the applicable Master Program*. Where there are extraordinary circumstances relating to the physical character or configuration of property, such that the strict implementation of the Master Program will impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020 ...
- (2) Variance permits for development and/or uses that will be located *landward* of the ordinary high water mark (OHWM) as

defined in RCW 90.58.030(2)(b), and/or *landward* of any wetland as defined in RCW 90.58.030(2)(h), may be authorized provided the applicant can demonstrate all of the following:

(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes or significantly interferes with, *reasonable use of the property*; ...

(3) Variance permits for development and/or uses that will be located *waterward* of the ordinary high water mark (OHWM) as defined in RCW 90.58.030(2)(b), or within any wetland as defined in RCW 90.58.030(2)(h), may be authorized provided the applicant can demonstrate all of the following:

(a) That the strict application of the bulk, dimensional or performance standards *set forth in the applicable master program* precludes *all* reasonable use of the property  
....

The law is therefore clear that variances regarding properties governed by the Shoreline Management Act may only be processed under the rules of the Department of Ecology. Those rules clearly distinguish between variances which would allow uses waterward of the ordinary high water mark, and variances which would allow uses landward of the ordinary high water mark. Kailin's proposal is clearly only a landward

proposal and is governed by the first portion of the variance language in the WAC, which provides essentially that a reasonable use shall be permitted, whereas the only uses which have to be allowed waterward of the ordinary high water mark are “any” reasonable use. In other words, someone who wishes to have an “edgewater inn” on a dock waterward of the ordinary high water mark, even if that is a “reasonable use” under the existing zoning, will not be permitted that use unless it is the only possible reasonable use. Such is not the case with uses landward of the ordinary high water mark, and the Shoreline Management Act trumps the Growth Management Act regulations.

### **ARGUMENT ON ISSUE NO. 3**

#### **CRITICAL AREAS DESIGNATION**

The Shoreline Management Act provides for designation of critical areas and shorelines. Those maps are in effect until superseded either by subsequent maps or by amendments to an approved Shoreline Master Program. Approval is required from the Department of Ecology before any amendments to a Shoreline Master Program may be effective. WAC 173-22-050.

Clallam County has submitted designation of shorelines and

wetlands associated with shorelines in the maps required pursuant to WAC 173-22-060 approved by the Department of Ecology and set forth in WAC 173-22-0610. Those maps were approved originally on June 30, 1972, and revised August 28, 1973, September 20, 1977, and finally on April 15, 1985. No subsequent maps have either been submitted or approved. Those maps were subsequently amended, if at all, only by the Shoreline Master Program adopted by Clallam County which was finally approved on June 16, 1992. The original of the Shoreline Master Program was approved by Clallam County on June 30, 1976 and finally approved by the Department of Ecology on August 5, 1976. None of those maps or designations indicate the Kailin property as having any critical areas or wetlands.

It is respectfully submitted that the reason for this is that the Department of Ecology and the Legislature in its statute never contemplated listing every minor low-class wetland as something to be concerned about under the Shoreline Management Act *unless* it was specifically designated. The maps that were approved will comport with that theory.

If that were not enough, WAC 173-22 is titled as follows:

“Adoption of Designations of Shorelands *and Wetlands Associated with Shorelines* of the State.” WAC 173-22-010 states the purpose of the WAC as follows:

Pursuant to RCW 90.58.030(2)(f), the Department of Ecology herein designates the wetland areas associated with streams, lakes and tidal waters which are subject to the provisions of Chapter 90.58 RCW.

Again, the designation for Clallam County is included in WAC 173-22-0610.

However, even if the above WACs did not exist, the underlying statute in the Shoreline Management Act, RCW 90.58.030(2)(f), defines shorelands as follows:

“Shorelands” or “shoreland areas” means those lands extending landward for 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark, floodways and contiguous floodplain areas landward 200 feet from such floodways, and all *wetlands* and river deltas associated with streams, lakes and *tidal waters* which are subject to the provisions of this chapter, *the same to be designated as to location by the Department of Ecology.*

Thus, the answer to the question, Did the Department of Ecology designate *as to location* any wetlands on the subject Kailin property? is

clearly No. Further, even if one were to argue that the critical areas “criteria” might apply to the land, clearly those are criteria and not wetlands “... designated as to *location* by the Department of Ecology.” Thus the legislature could have said ‘designated as to criteria’ or ‘designated as to nature’ but they didn’t say that. The legislature specifically dealt with requiring *location* by the Department of Ecology. The above-cited WAC provisions clearly show that the Department of Ecology also thought this is what the statute said.

It is true that designating every single wetland associated with every river delta, every stream, every lake and every length of tidal waters would be a herculean task. Therefore, it is probably the intent of the legislature and the Department of Ecology that small non-environmentally significant wetlands were not supposed to ever be designated.

The laws regulating land use are not intended to be construed against the landowner. They must be construed against the State if there is any ambiguity. It is respectfully submitted there is no ambiguity that the wetland was rightfully deemed too insignificant to designate.

Further, the legislature was not happy with the Growth Management Hearing Board’s interpretation of the application of critical

areas ordinances in shorelines. In a rare circumstance, the legislature set forth clear intent explaining why they were unhappy and what the intent of the new legislation was. The intent of the new legislation essentially says what the above says: That is, unless there is a designation of critical areas in a Shoreline Master Program of a county, the County cannot use its critical areas ordinance as part of the Shoreline Master Program. Even the interpretation of the amendments most favorable to the County that, until the Shoreline Master Program of a county is amended, they can regulate wetlands, still requires that those wetlands that they intend to regulate have been designated as to *location* by the Department of Ecology. In other words, a clear reading of the statute and the amendments to the statute is that even if a county does not have regulations to regulate the critical areas designated as to location by the Department of Ecology in their Shoreline Master Program, they may use their GMA critical areas ordinance to regulate those wetlands which already have been designated as to location by the Department of Ecology. Unfortunately for Clallam County, the Department of Ecology has never designated as to location any wetlands on the Kailin property.

In this instance, the Department of Ecology has designated as to

location a major Class 1 salt marsh wetland at the mouth of Jimmy Come Lately Creek which is almost adjacent to the Kailin property. So to say that they also somehow intended that the Kailin property be designated is obviously absurd.

#### **PREEMPTION OF SHORELINE REGULATION BY STATE**

The issue of the applicability of the critical areas ordinance which is *not* a part of the Shoreline Master Program and has not been approved by the Department of Ecology remains.

#### **INAPPLICABILITY OF CRITICAL AREAS ORDINANCE**

Area in shoreline jurisdiction must be regulated only as the State has specifically authorized. In Biggers v. Bainbridge, 124 Wn App 858 (2004), *aff'd*, 162 Wn 2d 683 (2007), the Supreme Court dealt with a development moratorium. The court said in paragraph 1 of the opinion,

*Today, we review the Bainbridge Island City (City) Council's adoption of rolling moratoria, which imposed a multi-year freeze on private property development in shoreline areas. The City denied the processing of permit applications for more than three years. There is no state statutory authority for the City's moratoria or for these multiple extensions... Clearly, this usurpation of state power by the local government disregards article XVII, section 1 of the Washington Constitution, which*

*expressly provides that shorelines are owned by the state, subject only to state regulation. The City is not authorized to adopt moratoria on shoreline development arising out of its police powers under article XI, section 11 of the Washington Constitution, which limits local government to regulation "not in conflict with general laws."*

Later in the opinion, the court states:

*Where there is doubt as to the existence of a state power arguably conferred to a local government, this court will construe the question against local government and against the claimed power. See J-R Distributors, 90 Wn.2d at 726. Here, because the SMA is the exclusive source of shoreline development regulation and because the SMA makes no affirmative grant of moratoria authority, local governments do not have implied power to adopt moratoria. The City's imposition of moratoria was ultra vires and in conflict with the SMA's regulatory framework.*

Critical areas such as the alleged wetland in this case are defined in RCW 90.58.030(2)(f), which states the following:

*“Shorelands” or “shoreland areas” means those lands extending landward for 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark, floodways and contiguous flood plain areas landward 200 feet from such floodways, and all wetlands and river deltas associated with*

the streams, lakes and tidal waters which are subject to the provisions of this chapter, *the same to be designated as to location by the Department of Ecology.*

In 2003, the legislature passed Engrossed Substitute House Bill 1933, Chapter 321, Laws of 2003. In section (1)(3), the legislature clearly set forth its intent.

The legislature intends that critical areas within the jurisdiction of the Shoreline Management Act *shall be governed by the Shoreline Management Act* and that *critical areas outside the jurisdiction of the Shoreline Management Act shall be governed by the Growth Management Act.* The legislature further intends that the quality of information currently required by the Shoreline Management Act to be applied to the protection of critical areas within the shorelines of the state shall not be limited or changed by provisions of the Growth Management Act.

In the same piece of legislation, the legislature amended RCW 36.70A.480 (the Growth Management Act). As they had earlier set forth in their legislative history, the legislative intent had to do with the fact that the state legislature stated that it was very upset with the Everett Shorelands Coalition v. City of Everett and Washington State Department of Ecology Growth Management Board hearing decision. The mandatory

language of 36.70A.480(3) includes the following:

As of the date the Department of Ecology approves a local government shoreline master program adopted under applicable shoreline guidelines, the protection of critical areas as defined by RCW 36.70A.030(5) *within the 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.*

(b) Critical areas within shorelines of the state that have been identified as meeting the definition of critical areas as defined by RCW 36.70A.030(5) *and that are subject to a shoreline master program adopted under applicable shoreline guidelines shall not be subject to the procedural and substantive requirements of this chapter except as provided in subsection (6).*

It has been pointed out that the Department of Ecology has approved Clallam County Shoreline Master Program and revisions only on the following dates: 11/16/76, 1/4/83, 3/27/84, 6/3/86, 3/1/88, 10/31/89, and 6/16/92. The Department of Ecology has *not* approved any revision to the Shoreline Master Program which includes the County's GMA critical areas ordinance.

RCW 36.70A.480(6), the section relied upon by the County, states:

If a local jurisdiction's master program does not include land necessary for *buffers* for critical areas that occur within shorelines of the state as authorized by RCW 90.58.030(2)(f) [*wetlands ... the same to be designated by the department of Ecology,*] then the local jurisdiction shall continue to regulate *those* critical areas [*wetlands ...designated by the Department of Ecology*] and their required buffers pursuant to RCW 36.70A.060(2).

The point is that the Department of Ecology has *not* identified any critical areas or critical area buffers. Nor has the Department of Ecology approved the County's technique of not identifying critical areas except when a project is proposed and then identifying critical areas themselves without either Department of Ecology approval or amendment of the Shoreline Master Program.

The Department of Ecology has not identified any critical areas on the Kailin property. The rules for variance of the Department of Ecology would apply if there were any critical areas in the shoreline jurisdiction. There is no need for any variance under Clallam County's approved Shoreline Master Program since the structure is landward of the 50 foot shoreline required setback. Because Clallam County's critical areas

ordinance has not been adopted as part of its Shoreline Master Program, approved by Ecology, Clallam County's critical areas ordinance does not apply within the shoreline jurisdiction.

If Clallam County's critical areas ordinance applies, then the variances must be dealt with, not under Clallam County's critical areas ordinance rules for variances, but under the Department of Ecology's rules for shorelines as set forth above. This is also true for reasonable use exceptions which are dealt with in the next section.

**SPECIFIC RESPONSE TO**  
**"ASSIGNMENTS OF ERROR" BY**  
**DEPARTMENT OF ECOLOGY**

The Department of Ecology misses the point of Kailin's argument. Kailin argued in the court below that the Shoreline Management Act is the exclusive controlling statute for Shoreline jurisdiction areas *and* that because the County's critical areas ordinance was not part of its Shoreline Master Program, the Shoreline Hearings Board was required to conclude that Clallam County's GMA critical areas ordinance was not applicable in the Shoreline jurisdiction. As cited above, there are numerous reasons for this, not the least of which are the clear words of the statute, but also the fact that the Department of Ecology has never designated any critical areas

in or on the Kailin property.

The Superior Court did not err in remanding the case back to the Shoreline Hearings Board 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. This is a simple question that requires a simple analysis. Did Clallam County comply with the Shoreline Management Act in adopting its critical areas ordinance? Answer: No. Therefore, is Clallam County's critical areas ordinance a valid shoreline regulation? The answer is No. Is the Clallam County ordinance, adopted pursuant to the Growth Management Act, somehow independently regulatory even though it is affecting areas that are governed by the Shoreline Management Act exclusively. Again, the answer is No.

It is respectfully submitted that the Court of Appeals should affirm the trial court.

The State's position seems to be that the County's Shorelines decision, which was affirmed by the SHB, even though it incorporates the County's critical areas ordinance, can't be challenged on an SHB appeal but must be challenged only in a LUPA appeal.

## CONCLUSION

It is not disputed that this proposed project is entirely within the 200 foot jurisdiction of the Shoreline Management Act. It is not disputed that a shoreline permit was sought. The major issue in dispute is whether or not the Shoreline Hearings Board has any further role in determining what gets developed on the property, and if that role extends to interpretation of what is in or is not in the County's Ecology-approved Shoreline Master Program.

It is respectfully submitted that the Land Use Petition Act was not intended to bifurcate the proceedings regarding a shoreline permit application to provide one appeal to the Shoreline Hearings Board and one appeal to the Superior Court under LUPA. In fact, the intent language of LUPA claims that it is designed to provide for speedy disposition of appeals.

It is also respectfully submitted that the Shoreline Management Act, adopted by the people, did not intend to allow counties or cities to avoid the operation of the Shoreline Management Act restrictions in the 200 foot jurisdiction of the Act by allowing counties to have different

regulations not approved by the Department of Ecology. In other words, if Clallam County had adopted an ordinance, not under its Ecology-approved Shoreline Master Program, providing, for instance, that no oil ports could be located in Clallam County, but such a restriction was not contained in its Shoreline Master Program, would Clallam County nevertheless be able to enforce such a restriction? I submit not.

Although Kailin appealed both under LUPA and to the Shorelines Hearings Board, that is because the existing case law is such that it would be malpractice not to do so. It is, however, respectfully submitted that the more logical choice for jurisdiction is the Shoreline Act and a Shoreline Hearings Board appeal where an individual has applied for a permit that is exclusively within the jurisdiction of the County Shoreline Master Program and the State Shoreline Management Act. The court should rule that the Shoreline Management Act gives exclusive jurisdiction to the appeal to the Shoreline Hearings Board.

It is not necessary for this matter to be remanded to the Shoreline Hearings Board. The Shoreline Hearings Board has already determined that the proposed building is not affected by the Shoreline setback (50 feet). It has also determined, correctly, that the County's critical areas

ordinance is not part of their Master Program. It has also, in effect, determined that no mitigation is required for shoreline permit approval because there is no impingement on the Shoreline 50 foot setback buffer. Therefore, instead of a remand to the Shoreline Hearings Board, it would have been appropriate for the court to simply rule that the Shorelines permit is approved and that the critical areas ordinance, not being part of the Master Program, is not applicable. In that case, no reasonable use exception is necessary, no mitigation is necessary, and the building permit may simply be granted. The only issue then remaining for the judge would be to determine the validity or invalidity of the Shoreline Hearings Board's determination of the location of the ordinary high water mark.

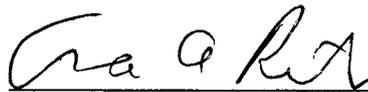
However, the court did remand to the Shoreline Hearings Board to allow it the opportunity to rule on this important issue.

It is respectfully submitted that this court may affirm the trial court but also rule that no remand is needed to the Shoreline Hearings Board because the critical areas ordinance of the County is inapplicable in

Shorelines jurisdictions and that Ecology has designated no wetlands on the Kailin property which could be regulated by a critical areas ordinance.

DATED this 20<sup>th</sup> day of April, 2009.

RITCHIE LAW FIRM, P.S.



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CRAIG A. RITCHIE, WSBA #4818  
Attorney for Respondents Kailin

COUNTY AND WDOE 'S WITNESS ADMISSIONS DURING SHB  
HEARING (JAN. 7-8 2008 )

The State Constitution establishes ownership of property by reference to ordinary high water mark .( P 294 L 5-8, Lund)

5 Are you aware that the constitution  
6 establishes ownership of property by reference to  
7 ordinary high water mark?  
8 A Yes.

In the Clallam County shoreline master program the county designates shorelines P 396 L 16-18 Gray)

16 Q Am I correct that in Clallam County's shoreline  
17 master program, the county designates shorelines?  
18 A Yes.

The only setback requirement that Ecology is administering here is the 50 foot setback from the ordinary high water mark. (P 312, L 4-7, Lund)

4 Q So the only setback requirement that Ecology is  
5 administering here is the 50-foot setback from the  
6 ordinary high water mark?  
7 A Correct.

Clallam County Shoreline Master Program was last amended in 1992 with Department of Ecology approval. (P. 357, L 4-10, Emery)

4 Q Well, am I correct that the last time that Clallam  
5 County amended its shoreline master program was  
6 about 1985 or '92?

7 A I believe '92 was the latest.

8 Q Okay. And am I correct that once that was amended,  
9 the Department of Ecology approved it?

10 A Yes.

11 Q Am I correct that the Department of Ecology has not

12 approved any amendment since 1992?

13 A Yes, I believe so.

Clallam County has not sent anything to the Department of Ecology designating shorelands or wetlands associated with shorelines of the state since 1985. P 398 L 14-20 Gray)

14 Q Am I correct that Clallam County to your knowledge

15 has not sent anything to the Department of Ecology

16 designating shorelands or wetlands associated with

17 shorelines of the state since 1985?

18 A That would appear, based on what the law says, is

19 the last time we sent any maps that way, that's

20 correct

The Department of Ecology has designated the wetland areas associated with the streams, lakes and tidal waters which are subject to the provisions of RCW 90.58 P 321 L 19-25, Lund)

19 Q And isn't it correct that pursuant to that same

20 section, 90.58.030(2)(f):

21 (READING) The Department of Ecology herein

22 designates the wetland areas associated with the

23 streams, lakes and tidal waters which are subject

24 to the provisions of RCW 90.58.

25 A Yes.

The designation of streams, lakes and tidal waters which are subject to the provisions of RCW 90.58 under WAC 173-22-0610 was approved by Department of Ecology for Clallam County, the latest revision being in 1985. P 321, L 21- 25 and P 322 L 1-8 (Lund)

19 Q And isn't it correct that pursuant to that same

20 section, 90.58.030(2)(f):

21 (READING) The Department of Ecology herein

22 designates the wetland areas associated with the

23 streams, lakes and tidal waters which are subject

24 to the provisions of RCW 90.58.

25 A Yes.

Q All right. And if you look at 1 WAC 173-22-0610,  
2 didn't the Department of Ecology designation get  
3 approved by the -- I'm sorry, didn't the Clallam  
4 County designation get approved by the Department  
5 of Ecology?

6 A Yes.

7 Q And that was done, the latest, in 1985?

8 A Yes.

The shoreline master program that has been approved by Ecology has a  
shoreline setback of 50 feet in the area of subject property . Page 398 L  
21-25. Gray

Q Now, in your shoreline master program that has been  
22 approved by Ecology, am I correct that it has a  
23 shoreline setback of 50 feet?

24 A Under the residential development section, that is  
25 correct.

The freshwater wetland on the site has no setback requirements and  
shoreline jurisdiction extends only to the edge of the wetland. (P.310 L  
8-20. Lund) See also P.399 L 22-23, Gray)

6 us in the briefing. Because you're a supervisor at  
7 Ecology in this area, are you aware of, in the  
8 Clallam County shoreline master program, any  
9 setback requirements from the wetland that we have  
10 heard testimony about, either in the shoreline  
11 master program or in the Ecology regulations  
12 themselves?

13 A It's my understanding that the -- that's no,  
14 because the freshwater wetland would be an  
15 associated wetland, and generally, especially under  
16 any of the master programs adopted prior to the new  
17 guidelines, and Clallam County is one of those, the  
18 associated wetlands are treated differently. They  
19 do not have setbacks. Shoreline jurisdiction

20 extends only to the edge of the wetland.

20 But in this case that would have only applied  
21 to the setback from the ordinary high water mark,  
22 not from the wetland, because the shoreline master  
23 program does not establish buffers for wetlands.

The entire Kailin property lies within the 200 ft. area governed by the  
Shoreline Management Act.( P. 310-L23-24, Lund)

21 Here, however, that freshwater wetland, which  
22 we would describe that as an associated wetland to  
23 the shoreline, Sequim Bay, but it's entirely  
24 contained within the 200-foot shoreland area  
25 anyway. But there isn't a shoreline setback from  
311  
that wetland. That's when  
1 you move into the  
2 critical area ordinance

Under either the Ecology or the Dr. Brooks' line indicating ordinary high  
water mark, the proposed house meets the shoreline master program's  
setback requirements from the ordinary high water mark. (P 309 L 12-16,  
Lund)

12 Q So under either the Ecology or the Dr. Brooks line,  
13 the house meets the shoreline master program's  
14 setback requirement from the ordinary high water  
15 mark?

16 A That is my interpretation of it, yes.

17 Q Okay

The shoreline development requirements are in the Shoreline  
Management Act and the proposal as it originally came in could have  
been built with a footprint of about 1,250 square feet under the shoreline  
master program requirements. P368 L 21-25 and 369 L 1-25) Emery)

18 EXAMINATION

19 BY JUDGE NOBLE:

20 Q Let me just ask, where is your shoreline

21 substantial development permit? Your shoreline

22 master program has never been codified; is that

23 right?

24 A That's correct.

25 Q So the shoreline

Page 369

requirements

1 are in your SMP?

2 A Actually, it's in the Shoreline Management Act. It

3 refers you to the criteria of the Shoreline

4 Management Act.

5 Q Okay. And your shoreline management code, that is

6 codified?

7 A That is codified.

8 Q But it has never been sent to Ecology to be

9 approved as an adjunct or part of your shoreline

10 master program?

11 A I don't know the answer to that.

12 Q Okay. I want to make certain, and this is probably

13 going to require you to repeat yourself, but I'm

14 sorry.

15 A That's okay.

16 Q The proposal as it originally came in, was it your

17 conclusion that you could not condition that except

18 under critical areas provisions?

19 A Yes.

20 Q So it could have been built that size, 1250 or

21 whatever it was, it could have been built --

22 A Yes.

23 Q -- under your shoreline master program

24 requirements?

25 A Yes.

The county's shoreline master program does not provide for any setbacks

from wetlands. (P 359, L 20-22. Emery)

19 Q All right. Do you agree with me that the county's  
20 shoreline master program does not provide for any  
21 setbacks from wetlands?

22 A That is correct

None of the present proposal for development impinges on the freshwater  
wetland on the site. (P .356 L 9-13, Emery)

9 Q This particular project didn't impinge on a  
10 wetland, did it?

11 A It impinged on the buffer.

12 Q Right. But not on the wetland?

13 A Correct

Ecology has not approved any aspect of the critical areas ordinance buffers  
as part of the Clallam County shoreline master program. (P 311 L 16-19,  
Lund)

16 Q And Ecology, I take it, has not approved any aspect  
17 of the critical areas ordinance buffers as part of  
18 the Clallam County shoreline master program?

19 A No. Clallam County has not got to that point yet.

20

The Clallam County Critical areas code was adopted under the Growth  
Management Act and not under the Shoreline Management Act. P 401 L  
6-10. Gray.)

6 Q Okay. And you agree with me that the critical  
7 areas ordinance was clearly adopted under the  
8 Growth Management Act, not under the shorelines  
9 act?

10 A Yes

Clallam County's critical areas ordinance does not designate any specific  
wetlands (on this property). (P. 358 L18-21 Emery)

Q All right. Now, am I correct that the critical  
19 areas ordinance does not designate any specific  
20 wetlands?  
21 A That is correct.

The wetland on the Kailin Trust property is not shown on county critical  
area maps. ( P 394 L 15-25 Gray)

15 Q Now, am I correct that in your critical areas maps  
16 that have been adopted by the county, the wetland  
17 on the Eloise Kailin Trust property, or the Kailin  
18 Trust property, was not shown?

19 A That is not uncommon in the county where there are  
20 wetlands.

21 MR. RITCHIE: Move to strike.

22 Q (Continuing by Mr. Ritchie) The question is, am I  
23 correct it was not shown?

24 A Yes. It's my understanding that that wetland was  
25 not mapped on the Kailin property.

The Department of Ecology adopted WAC 173-22-030 "and then  
subsection (11) or I guess section 11", to define ordinary high water mark.

The Department of Ecology and its employees and agents are bound to  
abide by that definition insofar as it meets the statute. (P 295 L4-13. Lund)

3 Q In pursuance of that, am I correct that the  
4 Department of Ecology adopted 173-22-030, and then  
5 subsection (11) or I guess section 11, to define  
6 ordinary high water mark?

7 A Correct.

8 Q Would you agree that the Department of Ecology and  
9 its employees and agents are bound also to abide by  
10 that definition insofar as it meets the statute?

11 A Uh-huh.

12 Q You did answer that as yes; is that correct?

13 A Correct. Sorry.

This WAC requires salt tolerant plants to be tolerant of salinity greater

than or equal to 0.5 parts per thousand salinity. It is silent about salt intolerant plants. (P 295, L 14-25, Lund)

14 Q Now, the WAC talks about salt-tolerant plants; is  
15 that correct?

16 A Yes, it does.

17 Q Does it mention anything about salt-intolerant  
18 plants?

19 A No, it doesn't.

20 Q Now, does it define salt-tolerant plants?

21 A Yes.

22 Q Does it require them to be tolerant of salinities  
23 greater than or equal to 0.5 parts per thousand  
24 salinity?

25 A Yes, it does.

The mean higher high tide is an elevation from mean lower low water. It's the average of the lower low tides, just as mean higher high is the average of the higher high tides. (Perry Lund. Page290, L 6-14)

6 Q All right. But am I correct that mean higher high  
7 tide is an elevation?

8 A Yes. We've established that.

9 Q And is an elevation from sea level; is that not  
10 correct?

11 A It's an elevation from mean lower low water. It's  
12 the average of the lower low tides, just as mean  
13 higher high is the average of the higher high  
14 tides. The relationship to mean higher high to sea  
15 level, you have to find the appropriate conversion  
16 table to make that

Neither Ms. Lux nor Jeff Stewart or Lund have ever measured the salinity of any of the Kailin property. (P.296 L 1-4. Lund)  
296

Q Would you agree with me that neither 1 Gretchen nor  
2 you nor Jeff Stewart have ever measured the  
3 salinity of any of the Kailin property?

4 A I believe that's correct.

The Power Point Packet used by Perry Lund for teaching purposes and to inform his location of the ordinary high water mark has been admitted to the record of the SHB and its pages are designated R-45 A through R-45 GG, (Page 252, L 17-19 Lund)

Page 252 15 JUDGE NOBLE: We can go back on the  
16 record, and I'll just make note that Exhibit R-45  
17 has been admitted, but it will have an additional  
18 designation, and that will be R-45A through R-45GG.  
19 All pages have been marked.

2 Q And you use this in teaching; is that correct?

3 A You're correct.

4 Q And it was developed by you for use in teaching; is  
5 that correct?

6 A It has been developed by a number of us at Ecology  
7 over a number of years and also through  
8 considerable feedback we get from each workshop  
9 where we ask for that feedback and turn around and  
10 try to do it a little bit better the next time.

11 Q But this is an internal document rather than  
12 something published as a WAC, correct?

13 A It has not been published as a WAC. We have  
14 presented it publicly many times. It's a public  
15 document.

This document has not been adopted as a WAC by the Department of Ecology (Page 250-51, L 23-24 and 251, L 1 Lund)

#### VOIR DIRE EXAMINATION

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22 BY MR. RITCHIE:

23 Q Am I correct -- leading questions -- Mr. Lund, that  
24 this document has not been adopted as a WAC by the  
25 department?

251

A 1 You're correct.

Ms. Lux did not locate the mean higher high tide but instead located the ordinary high water mark "per our methodologies for this system". P213 L 11-17 Lux.

Page 213

" L 11. Q Okay. So am I correct, you did not know where the  
12 mean higher high tide was; is that correct? I  
13 mean, you didn't locate it?  
14 A I didn't locate it, and I didn't intend to locate  
15 the mean higher high tide. I was locating the  
16 ordinary high water mark per our methodologies for  
17 this system.



postage fully prepaid thereon, and causing the envelope to be placed in the U.S.

Mail, addressed, respectively, as follows:

Douglas E. Jensen, Chief Civil Deputy  
Clallam County Prosecutors  
223 East Fourth Street, Suite 11  
Port Angeles, WA 98362-3015

Laura Watson, AAG  
Ecology Division  
Attorney General's Office  
PO Box 40117  
Olympia WA 98504-0117

Bruce L. Turcott, AAG  
Office of the Attorney General  
PO Box 40110  
Olympia WA 98504-0110

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20<sup>th</sup> day of April, 2009, at Sequim, Clallam County, Washington.

  
\_\_\_\_\_  
ERIKA HAMERQUIST  
Secretary