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SUPREME COURT OF THE STATE OF WASHINGTON

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FUTUREWISE, EVERGREEN ISLANDS, and SKAGIT AUDUBON
SOCIETY,

Respondents,

WASHINGTON STATE DEPARTMENT OF COMMUNITY, TRADE
AND ECONOMIC DEVELOPMENT; and WASHINGTON STATE
DEPARTMENT OF ECOLOGY,

Intervenors

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD; and CITY OF ANACORTES,

Appellants;

WASHINGTON PUBLIC PORTS ASSOCIATION,

Intervenor.

**STATE AGENCIES' ANSWER TO AMICUS CURIAE BRIEF OF
PACIFIC LEGAL FOUNDATION AND KITSAP ALLIANCE OF
PROPERTY OWNERS**

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This brief is filed in answer to the “Brief Amicus Curiae of Kitsap Alliance of Property Owners and Pacific Legal Foundation” accepted by the Court on November 8, 2007.

I. INTRODUCTION

Since 1972, the Shoreline Management Act (SMA), RCW 90.58, has required that counties and cities plan for appropriate use and protection of shorelines in Washington. Since 1990, the Growth Management Act (GMA), RCW 36.70A, has required that all counties and cities in Washington adopt development regulations to designate and protect critical areas, without any exception for critical areas in shorelines. RCW 36.70A.060; RCW 36.70A.170. Until 2003, the SMA was silent as to the protection of critical areas in shorelines; local governments, therefore, were required to adopt shoreline master programs and critical area regulations that harmonized the GMA and SMA directives.

In 2003, the Legislature enacted ESHB 1933 (Laws of 2003, ch. 321), amending both the GMA and the SMA. The bill transfers protection of critical areas in shorelines from local regulations adopted under the GMA to local regulations adopted as a shoreline master program. This transfer occurs “[a]s of the date the department of ecology approves a local government’s shoreline master program adopted under applicable shoreline guidelines.” RCW 36.70A.480(3)(a).

The amicus brief sheds no light on the issue presented in this case: the timing of the transfer under RCW 36.70A.480(3)(a). Instead, the amicus brief asserts, without any record, the existence of an “irreconcilable conflict” between critical areas regulations and a shoreline master program in another county, then offers a flawed analysis suggesting that regulation of critical areas in shorelines has *never* been authorized under the GMA. Neither contention is supportable and neither addresses the Growth Management Hearings Board’s erroneous legal conclusions in this case.

Here, the Board erred by reading ESHB 1933 to “instantly” transfer protection of shoreline critical areas to shoreline master programs. This error fails to give effect to RCW 36.70A.480(3)(a) and ignores the fact that in 2003 most shoreline master programs did not address critical areas because they had been adopted at a time when both the SMA and the shoreline guidelines lacked any reference whatsoever to critical areas. This error is manifest also because ESHB 1933 amended both the GMA and SMA to require critical areas protection in a shoreline master program that is “at least equal to” that provided by the local critical areas regulations. RCW 36.70A.480(4); RCW 90.58.090(4). A shoreline master program cannot provide equal protection if it provides none.¹

¹ See also WAC 173-26-201(2)(c) (2003 shoreline guidelines addressing how master program updates should address critical areas in shorelines). The prior shoreline

To solve the problem created by its first error, the Board committed a second error: it decreed the updated Anacortes critical area ordinance to be a “de facto” shoreline master program amendment that must be approved by Ecology before it takes effect, even though the City had not followed any of the legal procedures required for amending a shoreline master program. The City had acted to update its critical areas regulations to comply with the December 2005 deadline in the GMA at RCW 36.70A.130(4)(b). *See* CP 332. The deadline for updating its shoreline master program is not until 2012. RCW 90.58.080(2)(a)(iv).

The Superior Court corrected the Board’s misinterpretation, ruling that RCW 36.70A.480(3)(a), as amended, transfers protection when the shoreline master program has been updated to comply with the “applicable shoreline guidelines” adopted by Ecology. Requiring compliance with the “applicable shoreline guidelines” can only be understood as prospectively referencing the shoreline guidelines adopted in 2003.²

guidelines, adopted in 1972, had no provision addressing critical areas. *See* former WAC 173-26 (copy archived at http://www.ecy.wa.gov/programs/sea/small/laws_rules/173-16.html (last visited Nov. 18, 2007)). Local shoreline master programs adopted in compliance with the former guidelines would not have referenced critical areas, a legal concept first introduced in 1990 in the GMA. It would be unreasonable to expect 1970s guidelines and 1980s shoreline master programs to address a 1990s legal concept, except by happenstance.

² *See* pages 21-24 of Brief of Intervenor-Respondents Washington State Department of Community, Trade and Economic Development and Washington State Department of Ecology (“State Agencies’ Response Brief”) (filed May 21, 2007).

The Board should have required the City to defend its newly updated critical areas ordinance for GMA compliance. The Board erred, both legally and factually, by recasting the City's ordinance as a *de facto* shoreline master program amendment.³

II. ARGUMENT

This case is not about whether critical areas within shorelines are to be protected under the GMA or the SMA. All parties agree that ESHB 1933 provides for the protection of such critical areas in shoreline master programs. The issue is *when* that protection must be provided in a shoreline master program rather than in critical areas regulations. The two arguments raised in the amicus brief do not address this issue. Moreover, both arguments are incorrect. First, there is no "irreconcilable conflict" between critical areas regulations and a shoreline master program; indeed, the plain language of both the GMA and SMA requires that they be consistent. Second, the amicus brief is wrong to claim that critical areas regulations adopted under the GMA never applied in shorelines.

A. **The Asserted Conflict Between A Critical Areas Ordinance And A Shoreline Master Program In A Case Not Before This Court Has No Bearing On The Statutory Interpretation Issue**

The amicus brief cites SMA provisions that address particular uses, suggesting those provisions confer rights that cannot be abrogated by the

³ The State Agencies intervened in this appeal solely to address the Board's erroneous interpretation of ESHB 1933. They have not taken and do not take any position as to the adequacy of Anacortes' update of its critical areas ordinance.

GMA or by critical areas regulations adopted under the GMA. Amicus Br. at 3-5. On that basis, it asserts the existence of an “irreconcilable conflict” between a critical areas ordinance and shoreline master program in another county. *Id.* at 5-6. The ordinances adopted by Kitsap County, however, are not before this Court, and no evidence supports the amicus brief’s contention of any genuine “irreconcilable conflict.”

Local compliance with the GMA does not prevent compliance with the SMA. To the contrary, both the GMA and SMA require consistency between a local jurisdiction’s critical areas regulations and its shoreline master program, leaving discretion to cities and counties to devise consistent ordinances. RCW 36.70A.480(3) and RCW 90.58.190(2)(b) require that a shoreline master program comply with the consistency provisions of RCW 36.70A.040(4) and .070 (comprehensive plan must be internally consistent; development regulations must implement and be consistent with the comprehensive plan).⁴ Consistency with the comprehensive plan and development regulations also is required when a shoreline master program is updated. RCW 90.58.080(4)(b). RCW 36.70A.480(4) and RCW 90.58.090(4) require that the critical areas

⁴ Under RCW 36.70A.480(1), the goals and policies of a shoreline master program approved under the SMA are considered an element of the county or city’s comprehensive plan, and all other parts of the shoreline master program are considered to be development regulations. *See* pp. 12-13 in State Agencies Response Brief.

protection in a shoreline master program be “at least equal to” that provided by the county or city’s critical areas regulations. These provisions can and should be applied to avoid conflicts between critical areas regulations and shoreline master programs.

B. The Shoreline Management Act Is Not The Exclusive Source Of Local Authority To Regulate Shorelines

The amicus brief asserts, with no supporting authority, that ESHB 1933 “reaffirmed that the authority to regulate shoreline critical areas has always been under the SMA.” Amicus Br. at 7. It also contends the SMA is the “exclusive source of shoreline development regulation,” citing *Biggers v. City of Bainbridge Island*, ___ Wn.2d ___, 169 P.3d 14 (2007).⁵ Amicus Br. at 9. While the SMA requires local regulation of shoreline uses, a review of the GMA and SMA illustrates that the SMA has never provided exclusive or preemptive authority to address use, development, or protection of shorelines.

Until 1995, the GMA and the SMA separately imposed specific requirements on local governments; neither statute precluded the effectiveness of the other.⁶ Each statute simply was silent with respect to

⁵ The amicus brief relies on a portion of the lead opinion in *Biggers* that did not receive five votes of the Court. See Justice Chambers’ concurrence, slip op. at 6 (“Municipalities possess independent authority to regulate shorelines so long as the regulation does not conflict with the SMA”).

⁶ See, e.g., *City of Bremerton v. Sesko*, 100 Wn. App. 158, 995 P.2d 1257 (2000), in which landowners argued that the City’s zoning code was inconsistent with its

the other. The 1995 Legislature enacted ESHB 1724 to implement recommendations of the Governor's Task Force on Regulatory Reform, which called for the integration of the GMA and SMA. The GMA was to be the "fundamental building block of regulatory reform" and the "integrating framework for all other land-use related laws." Laws of 1995, ch. 347, § 1 (legislative intent, attached to RCW 36.70A.470). Section 104 of ESHB 1724 was codified as RCW 36.70A.480, adding four provisions relevant here: (1) for shorelines, the SMA's goals and policies in RCW 90.58.020 were added as a fourteenth goal of the GMA, complementing the thirteen goals in RCW 36.70A.020; (2) the goals and policies of a local shoreline master program adopted under the SMA were made an element of the local comprehensive plan adopted under the GMA; (3) all other portions of a shoreline master program, including use regulations, were made part of the local development regulations adopted to implement the comprehensive plan; and (4) shoreline master programs were to be adopted under SMA procedures rather than GMA procedures.

shoreline master program. The Court found no showing of inconsistency and rejected the argument that the SMA precluded other shoreline regulations:

Although RCW 90.58.100(1) states that Shoreline Master Programs "shall constitute use regulations for the various shorelines of the state," it does not state that such programs shall be the exclusive land use regulations of lands located on the shoreline.

Sesko, 100 Wn. App. at 162.

In counties and cities planning under RCW 36.70A.040, sections 108 through 110 of ESHB 1724 (amending RCW 36.70A.280 through .300) gave the Growth Management Hearings Boards authority to review challenges to shoreline master programs. Section 311 directed the Boards to “review the proposed master program or amendment for compliance with the requirements of this chapter [the SMA] and chapter 36.70A [the GMA].” Laws of 1995, ch. 347, § 311(2)(b) (amending RCW 90.58.190(2)(b)) (emphasis added).⁷

Since 1990, the GMA has required that critical areas be designated and protected by every city and county in Washington. See RCW 36.70A.060; RCW 36.70A.170. All five types of critical areas defined in RCW 36.70A.030(5) (wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation areas, frequently flooded areas, and geologically hazardous areas) can be found within “shorelines” as defined

⁷ In designating and protecting critical areas in shorelines after 1995, local governments generally have responded to the dual requirements of the GMA and the SMA in one of three ways: (1) designating and protecting critical areas in shorelines in their critical areas regulations; (2) incorporating by reference critical areas regulations into their shoreline master program; or (3) adopting substantively identical provisions to protect critical areas in shorelines in both their critical areas regulations and their shoreline master program. The 2003 guidelines for shoreline master programs specifically address incorporation by reference. See WAC 173-26-191(2)(b) (“a local government may include its critical area ordinance in the master program to provide for compliance with the requirements of RCW 90.58.090(4), provided the critical area ordinance is also consistent with this chapter”). Even where there are not specific cross-references between a critical areas ordinance and a shoreline master program, however, the normal rule is that both apply to protect critical areas in shorelines. See, e.g., *Washington Shell Fish, Inc. v. Pierce Cy.*, 132 Wn. App. 239, 131 P.3d 326 (2006) (upholding County code requiring separate authorizations for geoduck harvesting in eelgrass beds that were separately protected under the County’s shoreline master program and its critical areas regulations), *review denied*, 158 Wn.2d 1027 (2007).

in RCW 90.58.030. Until ESHB 1933, the GMA simply required that critical areas be designated and protected where they are found, without regard to whether they are in shorelines. See RCW 36.70A.060; RCW 36.70A.170.⁸ Likewise, until ESHB 1933, the SMA made no mention of critical areas designated under the GMA, and it included no language barring the application of local ordinances adopted under the GMA that protect critical areas in shorelines.

ESHB 1933 transfers the authority to regulate critical areas in shorelines from critical areas regulations adopted under the GMA to shoreline master programs adopted under the SMA. The issue in this appeal is *when* that transfer occurs. But ESHB 1933 would not have had to make *any* transfer of authority had there not been preexisting authority under the GMA to adopt development regulations that designate and protect critical areas wherever they are found in the landscape, including within the shoreline.

III. CONCLUSION

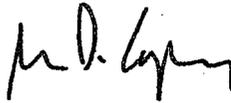
The amicus brief misstates the law prior to the enactment of ESHB 1933 and inaccurately asserts a conflict between the GMA and SMA where none exists. The issue before this Court is *when* ESHB 1933

⁸ See also WAC 365-190-020: "It is the intent of these guidelines that critical areas designations overlay other land uses including designated natural resource lands. That is, if two or more land use designations apply to a given parcel or a portion of a parcel, both or all designations shall be made."

transfers the protection of critical areas in shorelines from the GMA to the SMA. That transfer occurs “[a]s of the date the department of ecology approves a local government’s shoreline master program adopted under applicable shoreline guidelines.” RCW 36.70A.480(3)(a). This Court should affirm the Superior Court’s order partially reversing the Growth Management Hearings Board and remand to the Board for further proceedings.

RESPECTFULLY SUBMITTED this 19th day of November, 2007.

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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 19th day of November, 2007, at Olympia,
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