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SUPERIOR COURT
THURSTON COUNTY, WASH.

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No. 80396-0

BETTY J. GOULD, CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

BY DEPUTY

FUTUREWISE; EVERGREEN ISLANDS; and
SKAGIT AUDUBON SOCIETY,
Appellees,

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

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, an agency of the State of Washington; CITY OF
ANACORTES,
Appellants,

WASHINGTON PUBLIC PORTS ASSOCIATION,
Intervenors.

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CITY OF ANACORTES RESPONSE TO BRIEF AMICUS CURIAE
OF KITSAP ALLIANCE OF PROPERTY OWNERS AND
PACIFIC LEGAL FOUNDATION

Appeal from Thurston County Superior Court No. 06-2-00166-1;
transferred from Court of Appeals No. 35696-1-H

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ORIGINAL

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1. INTRODUCTION

The City of Anacortes agrees with Kitsap Alliance of Property Owners and Pacific Legal Foundation that it is the Shoreline Management Act (“SMA”) which is best suited for regulating shoreline critical areas. This Court has recognized that the SMA is specifically tailored to address the unique needs of shorelines.¹ This is why the legislature required jurisdictions to use the SMA for amending their shoreline critical area protections. In the present matter, the Growth Management Hearings Board did exactly as the legislature directed, and its decision is owed deference.

The City takes no position on amici’s argument that Growth Management Act (“GMA”) authority to regulate shoreline critical areas never existed. This is an argument the Court need not reach to resolve this case.

2. ARGUMENT

2.1 Anacortes Agrees with Amici that SMA must be used to Regulate Shoreline Critical Areas

Anacortes agrees with amici that it is the SMA which regulates shoreline critical areas. “The legislature intends that critical areas within the jurisdiction of the shoreline management act shall be governed by the

¹ *Biggers v. City of Bainbridge Island*, ___ Wn. 2d. ___, 169 P.3d 14 (October 11, 2007).

shoreline management act....”² The legislature told Ecology that it “**shall approve** the [SMA compliant] segment of a master program relating to critical areas....”³ Local governments are to submit their master program either in total “or by segments.”⁴ If a jurisdiction’s shoreline master program protects shoreline critical areas, those areas “**shall not be subject to**” GMA.⁵

Given this legislative direction, Ecology’s continued refusal to accept shoreline master program amendments is incomprehensible. As Ecology told the Superior Court, “the only way we can approve it is if they have done the whole master program update.”⁶

In contrast to Ecology’s unfortunate position, the Board gave effect to this legislation. The Board required Anacortes to submit its shoreline critical area amendments to Ecology for approval.

While we agree that critical areas within the shorelines of the state are not stripped by ESHB 1933 of protections given to them by existing critical area regulations, we do not agree that ESHB 1933 allows amendments to those regulations to continue to be governed by the GMA. We find it impossible to square such a result with the plain legislative intent expressed in ESHB 1933. As Petitioners point out, because of the statutory deadlines for adopting new shoreline master programs, such a gap would result in a delay of 10 years. ... By continuing to apply the GMA to

² AR 557 (ESHB 1933, Sec. 1, para. 3, *see* findings at RCW 90.58.030).

³ RCW 90.58.090(4) (emphasis added).

⁴ RCW 90.58.090(1).

⁵ RCW 36.70A.480(3)(b) (emphasis added).

⁶ RP 56:22-24 (Superior Court, October 13, 2006).

critical areas regulations enacted between the time of the adoption of ESHB 1933 and the time Ecology approves new shoreline master programs under the schedule adopted in RCW 90.58.080, this Board would be declining to conform its review of newly adopted critical areas regulations with the express legislative intent for that review until 2011 (at the earliest). **Because the legislature could not have been plainer in indicating that it wants the boards to apply the SMA rather than the GMA and BAS in reviewing challenges to critical areas regulations in the shorelines, we cannot adopt this construction of ESHB 1933.**⁷

The Board's interpretation is consistent with legislative intent. As the hearing body charged with interpreting both GMA and SMA, its decision is owed deference.⁸

2.2 The Board's Decision is Consistent with Ecology's Own Regulations, which not only Authorize, but Require Shoreline Master Program Amendment

Ecology's own regulations (the State Master Program Approval/Amendment Procedures and Master Program Guidelines) support amici's arguments on SMA primacy. In fact, these regulations direct the exact decision the Board made:

[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. ... If the development regulation is amended, the edition referenced within the master program will still be the operative regulation in the master program. **Changing the**

⁷ AR 850 (Board Final Decision and Order, pg. 27:9-24) (emphasis added).

⁸ RCW 36.70A.290; RCW 90.58.190.

referenced regulations in the master program to the new edition will require a master program amendment.⁹

The City of Anacortes shoreline master program incorporates the City's critical areas ordinances, and the City intended the critical area revisions to effect a program amendment.¹⁰ The Board simply required the City to take the extra step of obtaining Ecology approval as ESHB 1933 requires and Ecology's own regulations direct. The Board's decision should be affirmed.

2.3 GMA Authority to Regulate Shoreline Critical Areas before ESHB 1933's Enactment

Amici assert that GMA has never provided authority to regulate shoreline critical areas. Anacortes does not take a position on this argument, and the Court need not reach it to resolve this case. The legislature has determined that it is the SMA which is to be used to regulate shoreline critical areas.

3. CONCLUSION

The SMA is specifically tailored to regulate shoreline uses. The legislature directed jurisdictions to use it for regulating shoreline critical

⁹ WAC 173-26-191(2)(b) (emphasis added).

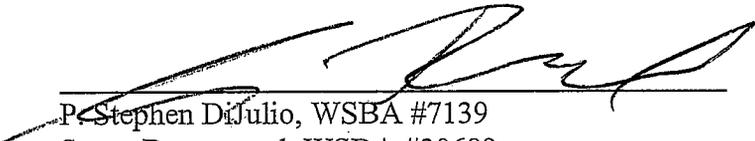
¹⁰ AR 851 (Board Final Decision and Order, pg. 28-29); AR 464 (Ordinance 2702, pg. 89) ("All areas within the City having one or more of these characteristics are hereby designated critical areas and are subject to the provisions of either this Title or Title 18.16 (City Shoreline Master Program)"); AR Transcript (Board Hearing, November 3, 2005), pgs. 52-53.

areas. The Board decision is consistent with this direction, and should be upheld.

RESPECTFULLY SUBMITTED this 20th day of November,
2007.

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DECLARATION OF SERVICE

Colleen A. Broberg declares as follows:

I am a legal assistant to Susan Drummond, attorney for Appellant City of Anacortes. I have personal knowledge of the facts in this declaration and am competent to testify to those facts.

On November 20, I caused City of Anacortes Response To Brief Amicus Curiae Of Kitsap Alliance Of Property Owners And Pacific Legal Foundation to be served via e-mail and U.S. mail, on the following:

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

DATED this 20th day of November, 2007, at Seattle, Washington.



Colleen A. Broberg, Legal Assistant to
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