

No. 35696-1-II

STATE OF WASHINGTON
BY _____
COURT OF APPEALS
DIVISION II

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DIVISION II
OF THE STATE OF WASHINGTON

FUTUREWISE; EVERGREEN ISLANDS; and SKAGIT
AUDUBON SOCIETY,

Respondents,

v.

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

Appellants,

and

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

Intervenors.

REPLY BRIEF OF APPELLANT CITY OF ANACORTES

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GLOSSARY

For ease of reference, below is the same glossary set forth in the City's opening brief (Brief of Appellant).

Anacortes	City of Anacortes
Board	Western Washington Growth Management Hearings Board
Central Board	Central Puget Sound Growth Management Hearings Board
City	City of Anacortes
County	Skagit County
Critical areas	Defined by RCW 36.70A.030 as the following areas and ecosystems: "(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."
Ecology	Washington State Department of Ecology
Everett	<i>Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology</i> , Central Puget Sound Growth Management Hearings Board Decision #02-3-0009c (January 9, 2003)
ESHB 1933	Engrossed Substitute House Bill 1933 ¹
Futurewise	Refers to Respondents Futurewise, Evergreen Islands, and Skagit Audubon Society; and Intervenors Washington State Department of Community, Trade and Economic Development, and Washington State Department Of Ecology
GMA	Growth Management Act, Chapter 36.70A RCW 36.70

¹ Proper citation would be to the session laws, Chapter 321, Laws of 2003. But, for clarity and consistency, the term ESHB 1933 is used. This is how the legislation is referred to in the Board decision, and by the parties throughout this litigation.

SEPA	State Environmental Policy Act, Chapter 43.21C RCW
Shoreline	Those areas within SMA jurisdiction, generally areas within 200 feet of the shoreline. See RCW 90.58.030
SMA	Shoreline Management Act, Chapter 90.58 RCW
SMP	Shoreline Master Program
Guidelines	The amended SMA regulations Ecology adopted in 2003 governing SMP revisions (Chapter 173-26 WAC)

1. **INTRODUCTION**

To resolve this litigation, the Court need only decide a narrow issue of statutory construction. Under ESHB 1933, may a jurisdiction amend a segment of its SMP to protect critical areas, or is the jurisdiction required to amend the entire SMP before transferring its critical area regulations to its SMP? Neither GMA nor SMA require an entire SMP to be amended to transfer regulatory jurisdiction from GMA to SMA. To the contrary, when the Legislature adopted ESHB 1933, it specifically addressed the issue in this case by authorizing amendment in segments:

The department shall approve **the segment of a master program relating to critical areas....**²

Within the time period provided in RCW 90.58.080, each local government shall have submitted a master program, either totally **or by segments**, for all shorelines of the state within its jurisdiction to the department for review and approval.³

The provisions of RCW 36.70A.172 [GMA requirements] shall not apply to the adoption **or subsequent amendment of a local government's shoreline master program....**⁴

The Legislature's direction is dispositive. Jurisdictions may adopt an SMP critical areas segment, and when they do so,

² AR 565, ESHB 1933, pg. 10, Sec. 3, para. 4, as codified at RCW 90.58.090(4), emphasis added (Appendix 1 of City Opening Brief).

³ AR 563, ESHB 1933, pg. 8, Sec. 3, para. 1), as codified at RCW 90.58.090(1), emphasis added (Appendix 1 of City Opening Brief).

⁴ AR 568 ESHB 1933, pg. 13, Sec. 5, para. 3(c)), as codified at RCW 36.70A.480(3)(c), emphasis added (Appendix 1 of City Opening Brief).

GMA requirements do not apply. This approach is consistent with the Legislature's intent and direction that SMA, and not GMA, regulate shoreline critical areas as of the date the Legislature enacted ESHB 1933.

2. ARGUMENT

2.1 Standard of Review

When faced with a statute which is susceptible to more than one interpretation, legislative intent is deferred to.⁵ And, the Court gives substantial weight to the Board in reviewing interpretations of the statute it administers.⁶

How the regulation of critical areas is transferred from GMA to SMA is susceptible to more than one interpretation and approach. Anacortes asks the Court to be guided by the Legislature's stated intent that SMA be used to regulate shoreline critical areas, as of ESHB 1933's 2003 effective date. This stated intent was adopted into law, and is not ambiguous:

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

⁵ *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 15, 57 P.3d 1156 (2002) (deferring to Board interpretation where consistent with legislative intent); *Towle v. Washington State Department of Fish and Wildlife*, 94 Wn. App. 196, 207, 971 P.2d 591 (1999) (rejecting "plausible" statutory interpretation because it conflicted with legislative intent).

⁶ *Thurston County v. Cooper Point Ass'n*, 148 Wn. 2d at 15.

areas outside the shoreline management act shall be governed by the growth management act.⁷

The Board's carefully reasoned analysis is consistent with the Legislature's stated intent, and in no way provides for retroactive application. The Board decision also avoids gaps in regulatory protection, and ensures a smooth transition from GMA to SMA regulation over critical areas.

2.2 Anacortes May Adopt an SMP Segment to Protect Critical Areas, without Updating its Entire SMP

The SMA has long authorized jurisdictions to adopt new segments into their SMP's:

A master program, **segment of a master program, or an amendment** to a master program shall become effective when approved by the department. Within the time period provided in RCW 90.58.080, [the schedule SSB 6012 amends] each local government shall have submitted a master program, **either totally or by segments**, for all shorelines of the state within its jurisdiction to the department for review and approval.⁸

When the Legislature adopted ESHB 1933, it maintained this approach when it added the following language:

The department 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

⁷ AR 557, ESHB 1933, pg. 2, Sec. 1, para. 3 (Appendix 1 of City Opening Brief).

⁸ AR 563, ESHB 1933, pg. 8, Sec. 3, para. 1, or RCW 90.58.090(1) (Appendix 1 of City Opening Brief).

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).⁹

When a jurisdiction adopts an SMP segment to protect critical areas, SMA, and not GMA requirements, apply:

The provisions of RCW 36.70A.172 [GMA requirements] shall not apply to the adoption **or subsequent amendment of a local government's shoreline master program** and shall not be used to determine compliance of a local government's shoreline program with chapter 90.58 RCW and applicable guidelines. Nothing in this section, however, is intended to limit or change the quality of information to be applied in protecting critical areas within shorelines of the statute, as required by chapter 90.58 RCW and applicable guidelines.¹⁰

With these amendments, the Legislature authorized the adoption of SMP segments to protect critical areas. When this occurs, SMA, and not GMA, requirements apply.

In contrast, the Superior Court decision prohibits the adoption of an SMP segment to protect critical areas. With the Superior Court approach, GMA requirements apply to shoreline critical area regulation amendments, until such time as a jurisdiction's entire SMP is amended. The Court decision should be reversed, and the Board decision upheld.

⁹ AR 565, ESHB 1933, pg. 10, Sec. 3, para. 4), as codified at RCW 90.58.090(4), emphasis added (Appendix 1 of City Opening Brief).

¹⁰ AR 568 (ESHB 1933, pg. 13, Sec. 5, para. 3(c)), as codified at RCW 36.70A.480(3)(c), emphasis added (Appendix 1 of City Opening Brief).

2.3 Adopting an SMP Segment to Regulate Critical Areas, is Consistent with SSB 6012, which does not Prohibit Early SMP Amendment, and is not Even Relevant to this Appeal.

In an effort to divert the Court from the Legislature's specific direction in ESHB 1933, Futurewise relies on a statute which has no relevance to this appeal. SSB 6012 contains amendments to the SMA which do not reference the revisions made through ESHB 1933. SSB 6012 is separate legislation that simply sets deadlines for jurisdictions to complete SMP updates. Even if it somehow applied, it in no way prohibits the City from adopting SMP shoreline critical area regulations.

2.3.1 SSB 6012 is not Relevant to this Appeal

SSB 6012 has no relevance whatsoever to this appeal. SSB 6012 does not reference the amendments made in ESHB 1933. Nor does that legislation provide any direction on how jurisdictions are to protect critical areas. All it does is establish deadlines for jurisdictions to update their SMP's.

Futurewise attaches importance to the effective dates of ESHB 1933 and SSB 6012, which are the same, but fails to explain how this is relevant. Simply because SSB 6012 provides deadlines for SMP updates¹¹, and has the same effective date as ESHB 1933, does not provide

¹¹ For example, applying SSB 6012, the City of Anacortes' outside deadline for a complete SMP update is not until 2012. RCW 90.58.080(2)(a)(iv).

any insight on whether the SMA or GMA govern shoreline critical area amendments.

2.3.2 Even if SSB 6012 were Relevant, it is Does not Prohibit a Jurisdiction from Adopting an SMP Segment to Protect Shoreline Critical Areas.

SSB 6012 provides that SMP updates may be completed “**on or before**” certain deadlines, ranging from 2005-2014. The fact that a jurisdiction may choose to adopt an SMP segment to protect critical areas before it may be statutorily required to update its entire SMP in no way upsets these deadlines. Rather, SSB 6012 provides:

Nothing in this subsection (2) [update deadline schedule] shall preclude a local government from developing or amending its master program prior to the dates established by this subsection (2).¹² ...

Local governments are encouraged to begin the process of developing **or amending** their master programs early....¹³

Futurewise attempts to use SSB 6012 to somehow prohibit a local jurisdiction from adopting an SMP critical areas segment before updating the entire SMP. But the plain language of the statute is to the contrary.

SSB 6012 does not somehow change ESHB 1933’s effective date of July 27, 2003, to dates ranging between 2005 through 2014. As of July, 27, 2003, shoreline critical area amendments are governed by SMA, and not GMA. The City of Anacortes is authorized to adopt an SMP critical

¹² RCW 90.58.080(2)(b), emphasis added.

¹³ RCW 90.58.080(5).

areas segment to protect its shoreline critical areas, and this action is governed by SMA, not GMA.

2.4 There is no Gap in Regulatory Protection Under ESHB 1933

With the Board's approach to ESHB 1933, existing GMA shoreline critical area regulations remain in place until Ecology approves an SMP critical areas segment. Consistent with this approach, Anacortes continues to apply all existing GMA regulations in its shorelines. In addition, it also applies the more protective critical area amendments that the City adopted following ESHB 1933. The City will continue to take this approach subject to Ecology approval of a City SMP segment protecting shoreline critical areas.

3. CONCLUSION

ESHB 1933 authorizes a jurisdiction, such as the City of Anacortes, to amend its SMP to protect critical areas. To do so, the jurisdiction may adopt an SMP critical areas segment, without updating the entire SMP. The Board's approach is consistent with GMA and SMA, and with the Legislature's intent and clear direction that the SMA, rather than GMA, govern shoreline critical area regulation enactments, as of ESHB 1933's effective date.

RESPECTFULLY SUBMITTED this 19th day of June, 2007.

ANACORTES CITY ATTORNEY
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A handwritten signature in black ink, appearing to read "P. DiJulio", written over a horizontal line.

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DECLARATION OF SERVICE

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
CLERK OF COURT
JAN 11 2011
ANACORTES, WA

DECLARATION OF SERVICE

Sherry R. Toves declares as follows:

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

DECLARATION OF SERVICE - 1

ORIGINAL

On June 20, 2007, I caused one copy of City of Anacortes' Reply Brief of Appellant and this Declaration to be delivered via legal messenger service by 4:30 p.m. on the parties of record as follows:

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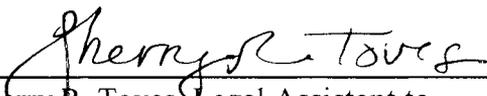
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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Sherry R. Toves, Legal Assistant to
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DECLARATION OF SERVICE - 3