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IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY  DEPUTY

KITSAP ALLIANCE OF PROPERTY OWNERS,
WILLIAM PALMER, and RON ROSS,

Petitioners/Appellants,

v.

CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD, et al.,

Respondents/Appellees.

On Appeal from the Superior Court of the
State of Washington for Kitsap County

APPELLANTS' REPLY TO KITSAP COUNTY

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The Growth Management Act's (GMA) "best available science" (BAS) requirements are intended to provide a semblance of reliability and objectivity to the process of developing critical area regulations. But Kitsap County chose to take a different approach. Admitting that it "was not prepared" to do the necessary studies to revise its critical area regulation to reflect the actual conditions on its shorelines, the County relied on generalizations, estimates, and ultimately adopted inapplicable and uniform buffers on all marine shorelines "[u]ntil we learn more about the full suite of marine riparian functions." AR V8, Tab 72 at 20 n.86; AR V8, Tab 72, Index 776 at 20.

The County's marine buffers are invalid for three reasons. First, the amendments in Engrossed Substitute House Bill (ESHB) 1933 mandate the very studies that the County "was not prepared" to do. Second, the County's failure to include applicable studies in its record violated the GMA's BAS requirements. And third, the County chose to impose buffers as a series of conditions on all new development, exacting land, services, and an allocation of liability from property owners, in violation of RCW 82.02.020. Petitioners Kitsap Alliance of Property Owners, William Palmer and Ron Ross (collectively KAPO) respectfully request that this Court reverse the Growth Board's decision affirming the County's critical areas update.

ARGUMENT

I

THE GROWTH BOARD ERRED IN AFFIRMING THE COUNTY'S DESIGNATION OF ALL MARINE SHORELINE AS CRITICAL AREAS

Contrary to Kitsap County's claim, the impact of ESHB 1933 has been part of this appeal since the very beginning.¹ In its opening brief to the Growth Board, KAPO argued that the County improperly designated all marine shorelines as critical areas by failing to include in the BAS record the quality of information (such as a shoreline inventory) required by the Shoreline Management Act (SMA) to support the designation and regulation of these areas. AR V3, Tab 37 at 9-10. The County responded by arguing that the amendments contained in ESHB 1933 authorized it to regulate marine shorelines under the GMA without regard to the substantive requirements and limitations of the SMA. AR V6, Tab 42 at 42-43 n.84; *see also* AR V7, Tab 47 at 9-10 (KAPO's reply, arguing that the County had improperly interpreted ESHB 1933 to elevate the GMA above the SMA). At oral argument, the County reiterated that it had not interpreted ESHB 1933 to require a detailed study of its shorelines as part of the GMA critical areas

¹ Kitsap County incorrectly argues that this issue has been raised for the first time on appeal. Kitsap County Resp. Br. at 14-19.

update process. Instead, the County believed the analysis could occur at some point in the future when the County updates its shoreline regulations. *See* AR V7, Tab 55 at 149-151.

Based on the County's argument, the Growth Board analyzed the impact of ESHB 1933 on local government's authority to regulate its shorelines under the GMA as part of its review of KAPO Issue No. 4. AR V7, Tab 60 at 20-29 (*see* discussion sections entitled, "Interaction between statutory regimes for GMA critical areas and SMA shorelines" and "How do Central Puget Sound cities and counties construe ESHB 1933?"). The Board noted an apparent split of authority. AR V7, Tab 60 at 28 n.34. In *Biggers*, this Division of the Court of Appeals determined that ESHB 1933 codified the Legislature's intent to make the SMA the sole method to regulate shoreline. AR V7, Tab 60 at 28 n.34; *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 866-67 (2004), *affirmed by* 162 Wn.2d 683, 699 (2007). In *Preserve Our Islands*, Division I concluded that neither the SMA nor the GMA trumped one another, and required that the two statutes be harmonized. AR V7, Tab 60 at 28 n.34; *Preserve Our Islands v. Shoreline Hearings Bd.*, 133 Wn. App. 503 (2007). The Board concluded that because "there is no single interpretation of the ambiguity inherent in ESHB 1933—specifically RCW 36.70A.480(5)," the Board would "defer" to the

County's decision to interpret ESHB 1933 as authorizing it to regulate shoreline areas without regard to the SMA. AR V7, Tab 60 at 29-30 n.35 (citing County's Response brief AR V6, Tab 42 at 42-43, n.84. And as a result, the Growth Board framed KAPO's designation challenge (under RCW 36.70A.480(5)) as being subject to the County's interpretation of ESHB 1933.² AR V7, Tab 60 at 30. This legal issue, which was briefed by the parties and decided on its merits as part of KAPO Issue No. 4, is properly before this Court on appeal.

There is no disputing the Legislature's clear statement of intent 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." RCW 90.58.030 (Findings—Intent); RCW 36.70A.480. In fact, five times since the enactment of ESHB 1933, our courts and growth boards have interpreted ESHB 1933 as a mandate requiring local government to use the procedures set forth in the SMA, rather than the

² If Kitsap County believed that the Growth Board had improperly decided the ESHB 1933 issue, then it bore the burden of filing a timely petition for judicial review within 30 days of the board's order. *See* RCW 36.70A.300(5). The County cannot sit on its objection for over 2 years, then argue on appeal that the issue was never properly raised to the Board.

GMA, when regulating shorelines.³ The County has provided no substantive response to the Supreme Court’s most recent interpretation of ESHB 1933 in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242 (2008). See Kitsap County Resp. Br. at 20 n.69 (“The County will not attempt to argue the merits of *Futurewise* here as KAPO does in its Opening Brief.”). The Growth Board’s decision upholding the County’s designation and regulation of all marine shorelines as critical areas is clearly erroneous and should be reversed.

A. The *Futurewise* Majority Rejected Kitsap County’s Interpretation of the Impact of ESHB 1933

Kitsap County attempts to avoid the holding of *Futurewise* by claiming that it is a nonbinding plurality decision.⁴ Kitsap County Resp. Br. at 20. While it is generally accepted that a plurality decision has limited

³ See *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242 (2008); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 699 (2007); *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 866-67 (2004); *Citizens Protecting Critical Areas v. Jefferson County*, WWGMHB No. 08-2-0029c at 16-17 (Final Decision and Order, Nov. 19, 2008); *Evergreen Islands v. City of Anacortes*, WWGMHB No. 05-2-0016 at 31 (Final Decision and Order, Dec. 27, 2005).

⁴ The County alternatively suggests that the *Futurewise* decision is only binding within the jurisdiction of the Western Growth Board. To the contrary, a decision by the Supreme Court is binding on all lower courts in the state, including the three Growth Boards acting in their quasi-judicial capacity. E.g., *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 358-60 (2008) (reversal of error committed by Western Growth Board applies to all growth boards).

precedential effect, that does not mean that such a decision has no binding effect. See *Wright v. Terrell*, 162 Wn.2d 192, 195-96 (2007) (It is error to conclude that a plurality decision has no binding effect on issues that drew majority supports.). The *Futurewise* decision drew the support of five Justices on the precise issue of SMA/GMA interplay that the Growth Board in this case decided on Pages 26-30 of its Final Decision and Order. *Futurewise*, 164 Wn.2d at 247-48; AR V7, Tab 60 at 26-30. In fact, the five Justices also concurred in reversing the superior court's memorandum decision in *Futurewise* (which adopted the exact same interpretation of ESHB 1933 as the County in this case). *Futurewise*, 164 Wn.2d at 247-48 (reversing Thurston County Superior Court No. 06-2-00166-1 (Final Judgment and Order, Nov. 17, 2006) (attached as Appendix A). *Futurewise* has precedential effect and requires reversal of the decision in this case.

B. The *Biggers* Decisions Analyzed the Impact of ESHB 1933 on the GMA/SMA and Held That the SMA Governs Shoreline Development

Kitsap County tries to avoid the *Biggers* decisions by claiming that neither this Court of Appeals nor the Supreme Court considered the impact of ESHB 1933. Kitsap County Resp. Br. at 20-21. Again, the County is wrong.⁵ In its reply brief to this Court, the city unsuccessfully argued that the

⁵ The Growth Board in this case recognized that this Court interpreted the
(continued...)

ESHB 1933 authorized it to exercise concurrent jurisdiction over shoreline areas under both the GMA and SMA. *See Biggers*, 124 Wn. App. at 866-67; *see also City of Bainbridge Island Reply Brief*, No. 77150-2, 2004 WL 3775336, at *3-*6 (Wash. Mar. 1, 2004). This Court rejected this argument:

The GMA clearly specifies that chapter 90.58 RCW (the SMA) governs the unique criteria for shoreline development. In other words, the SMA trumps the GMA in this area, and the SMA does not provide for moratoria on shoreline use or development.

Biggers, 124 Wn. App. at 867, *affirmed by Biggers*, 162 Wn.2d at 699.

C. The Record Refutes Kitsap County's Claim That Its Marine Shoreline Buffers Fall Within the Limited Exception in RCW 36.70A.480(6)

Kitsap County alternatively claims that its marine shoreline critical area buffers fall within the limited exception to SMA exclusivity contained in RCW 36.70A.480(6). Kitsap County Resp. Br. at 21-27. This argument is unsupported by the record and should be rejected.⁶ Moreover, the County's

⁵ (...continued)
amendments to the GMA and SMA in ESHB 1933 in *Biggers*. AR V7, Tab 60 at 28 n.34.

⁶ It is worth noting that Kitsap County's assertion that it adopted its marine buffers under RCW 36.70A.480(6) contradicts a statement the County recently made in an amicus brief filed with the Supreme Court in *Futurewise*. In that brief, the County asserts that the marine buffers were adopted under RCW 36.70A.480(3)(a). *See Amicus Brief of Counties in Support of Motions for Reconsideration* at 2, 7-9 (*Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, No. 80396-0, Aug. 26, 2008).

interpretation of RCW 36.70A.480(6) is wrong. There is nothing in the plain language of this statute that can be construed as transferring blanket jurisdiction over shorelines to the GMA:

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), then the local jurisdiction shall continue to regulate those critical areas and their required buffers pursuant to RCW 36.70A.060(2).

RCW 36.70A.480(6); *Thurston County*, 164 Wn.2d at 342 (Our Courts strictly construe the GMA because it was controversial legislation.); *Biggers*, 162 Wn.2d at 701 (“Although the GMA frequently mentions shoreline master programs, the GMA could not alter the provisions of the SMA without express amendment.”). Instead, RCW 36.70A.480(6) addresses the limited circumstance where (1) land necessary to protect critical areas and their buffers in shoreline areas exceeds the amount of land included in the SMP, and (2) local government will not expand its shoreline jurisdiction in the SMP. *See Evergreen Islands*, WWGMHB No. 05-2-0016 at 29-30. This exception cannot and does not apply here where the County's 50/100-foot marine shoreline buffers are well within the SMA's exclusive jurisdiction over all property extending 200 feet landward from the shoreline. RCW 90.58.030(2)(f).

II

KITSAP COUNTY'S MARINE SHORELINE BUFFERS FAIL TO COMPLY WITH THE BEST AVAILABLE SCIENCE REQUIREMENT

The BAS issue is not as cut and dried as the County would have this Court believe.⁷ The Growth Board recognized that the County's marine shoreline BAS presented what it called an "immature science dilemma." AR V7, Tab 60 at 41-42. Indeed, each and every party to this case has concluded at some point in this appeal that the BAS was inadequate to support the County's expanded marine buffers. *See, e.g.*, AR V8, Tab 72, Index 114 at 20 (Kitsap County's "Summary of the Best Available Science Review," marine riparian buffers "do not identify specific widths based on direct scientific evidence."); AR V8, Tab 83 at 13-14 (Hood Canal, "The County's justification for setting a 100-foot buffer and a 50-foot buffer . . . is absolutely backwards in regards to the science.").

⁷ Kitsap County complains that KAPO failed to cite the substantial evidence standard of review under RCW 34.05.570(3)(e). Kitsap County Resp. Br. at 28 n.96. To the contrary, KAPO alleged: "The Order Finding Compliance is not supported by evidence that is substantial when viewed in light of the whole record. Substantial evidence when viewed in light of the whole record shows that the County's Best Available science is insufficient to support larger wetland buffers." AR V8, Tab 89 at 5; *see Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 288 (2004) (citing the specific subsection of the statute is not necessary where assertions of error in the petition set out the standards for review).

The uncertain state of the County's BAS record poses a problem for the County because the GMA only requires that a county protect critical areas from new harm; it does not require regulations to enhance or restore already degraded critical areas. See *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 427-31 (2007) (rejecting the argument that protection of critical areas required that the county "restore habitat functions and values that no longer exist"). Therefore, before adopting critical area regulations, it is incumbent on the County to include BAS that actually identifies the existing functions and values of the critical area that will be threatened if use of the property is allowed. *Swinomish*, 161 Wn.2d at 430; *Tracy v. City of Mercer Island*, CPSGMHB No. 92-3-0001, at 25 (Final Decision and Order, Jan. 5, 1993) (The requirement to protect a critical area "presumes that the critical area *presently exists.*") (emphasis added). The County admits that it "was not prepared" to do the necessary studies to assure that its buffers are keyed to actual conditions on its shorelines, and instead relied on the precautionary principle to determine the size of its buffers. AR V8, Tab 72 at 20 n.86; AR V8, Tab 72, Index 776 at 20. The County's failure to substantiate the need for uniform marine shoreline buffers violates the GMA's BAS requirement.

A. The County Ignored the BAS' Science-Based Solution for Setting the Size of Its Marine Shoreline Buffers in Favor of the Precautionary Principle

Buffers may be an easy and common tool to regulate critical areas, but they are not required by the GMA. *Swinomish*, 161 Wn.2d at 430-31. Indeed, buffers that are too big are not necessary to protect the actual functions and values of critical areas, and constitute enhancement or restoration regulations exceeding the GMA's requirements. *Swinomish*, 161 Wn.2d at 427-31; *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 835 (2005); *Honesty in Env'tl. Analysis Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 533-34 (1999). Despite substantial BAS rejecting uniform buffers on marine shorelines in this case,⁸ the County explains that it adopted its buffers based largely on the J. S. Brennan and H. Culverwell study, *Marine Riparian: An*

⁸ "There are insufficient data in the scientific literature to recommend generic or region-wide setback distance . . . in marine riparian habitats" resulting in "the dimensions of the setback [having] to be modified by site specific conditions such as slope stability." AR V6, Tab 42, Index 1363 at 14 (Colin Levings and Glen Jamieson, *Marine and Estuarine Riparian Habitats and Their Role in Coastal Ecosystems, Pacific Region* (Fisheries and Oceans Canada, 2001)). "Functions of marine riparian vegetation need to be better documented in the scientific literature in order to create adequate policies for protection (e.g., functional buffer widths) and restoration . . ." Index 590 (G. D. Williams and R. M. Thom, *Marine and Estuarine Shoreline Modification Issues*, Batelle Marine Sciences Laboratory, White Paper submitted to Washington Department of Fish and Wildlife at 81 (Apr. 2001)).

*Assessment of Riparian Functions in Marine Ecosystems.*⁹ Kitsap County Resp. Br. at 32 (citing AR V8, Tab 42, Index 776). This study offered two recommendations, one science-based and the other policy-based:

- The *science-based solution* recommended scientifically appropriate buffers based on consideration of site specific factors and the actual functional characteristics and associated benefits of the regulated property. AR V8, Tab 72, Index 776 at 20-21
- The *policy-based solution* suggested that “[u]ntil we learn more about the full suite of marine riparian functions, we should rely on [freshwater buffer science] and address uncertainty by *taking a precautionary approach*, providing buffers that protect marine shorelines.” AR V8, Tab 72, Index 776 at 20 (“Use the Precautionary Principle: ‘Do No Further Harm.’”).

The County adopted the precautionary recommendation without engaging in any of the required analyses of the science-based recommendation. But the precautionary principle is not science, and cannot satisfy the BAS requirement. Expressed in its most basic form, the precautionary principle reflects the age-old adage: “better safe than sorry.”

See Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 Wash. & Lee L. Rev. 851, 851 (1996). As a legal principle, the precautionary

⁹ Kitsap County tries to bolster the *appearance* of a robust scientific record by citing, without discussion, inapplicable studies in long string citations in footnotes. For example, the County repeatedly cites studies on estuaries (*e.g.*, Kitsap County Resp. Br. at 30-34 n.107; 31 n.108; 31 n. 111; 34 n 121). Yet in its pleadings to the growth board, the County explained that there were no estuarine areas in the urban marine shorelines, and estuarine areas were protected as a separate category of critical areas (with 100-200 foot buffers). AR V8, Tab 80 at 8.

principle insists that the lack of full scientific certainty should not stand in the way of regulatory action. Cross, 53 Wash. & Lee L. Rev. at 851. The precautionary principle (as expressed in the Brennan and Culverwell study) suggests that government should act to protect the environment, even in the absence of clear evidence of harm and notwithstanding the costs of such actions. Cross, 53 Wash. & Lee L. Rev. at 851; *see also* AR V8, Tab 72, Index 776 at 20.

Proponents and critics of the precautionary principle agree that, when used as a decision-making tool, the principle is properly considered as a matter of policy, not science. *See* Holly Doremus, *Precaution, Science, and Learning While Doing in Natural Resource Management*, 82 Wash. L. Rev. 547, 558-60 (2007) (resort to the precautionary principle is a moral argument “that makes no pretense of value neutrality”); *id.* at 560 (citing Gail Charnley & E. Donald Elliott, *Risk Versus Precaution: Environmental Law and Public Health Protection*, 31 *Envtl. L. Rep.* 10,363, 10,365 (2002) (arguing that regulatory decisions adopted under the precautionary principle should disclose “that policy, not science, underlies those standards.”)). The County’s decision to adopt the policy-based precautionary solution constitutes an unjustified departure from BAS, and requires reversal. *Swinomish*, 161 Wn.2d at 430-31; *Ferry County*, 155 Wn.2d at 835.

B. The County's BAS Record Does Not Include Necessary Analysis of the Actual Conditions on Its Urban Marine Shorelines

The precautionary approach taken by the County identifies the generalized problem (development of shorelines may impact functions and values of marine riparian areas), but leaps past the required scientific analysis of the impact of development on the functions present on Kitsap County's shorelines. For example, the County imposed precautionary buffers on its urban shorelines despite having determined that its BAS was inapplicable. When asked by the Growth Board how it arrived at the 50-foot urban marine shoreline buffer, the County explained that

The critical areas that are off those [urban] shoreline[s] are degraded. They're not—they're of low quality. Therefore, they have low—or they have limited functions. And that's what we're here to protect, is the functions and values of the critical areas. That critical area is providing limited functions. The buffer to protect them can correspondingly be smaller
.....

AR V8, Tab 83 at 26. Because its urban shorelines “simply do not provide or support the whole range of functions that can be provided by a healthy riparian system,” the County determined that the BAS it had used to set the size of its rural/semi-rural marine buffers was not applicable. AR V8, Tab 80 at 9 (buffers recommended by record are “applicable only to those ‘healthy (i.e., intact and functional) riparian systems . . .’ [t]his is not the case with

Kitsap County's urban shorelines."); AR V8, Tab 80 at 9 ("[B]uffer widths that encompass *all* possible buffer functions are not applicable."); AR V8, Tab 72 at 20 ("[T]he ability for a buffer to effectively provide the functions necessary to protect the [urban] critical area is diminished.").

Under the GMA, a determination that the BAS is inapplicable imposes an obligation on the County to develop applicable BAS before adopting critical area regulations. *Whidbey Env'tl. Action Network v. Island County (WEAN)*, 122 Wn. App. 156, 173 (2004) (local government violated the GMA when it developed its stream buffers based in part on a study that "was limited to 'the [marine] shoreline environment of Island County' and [had] questionable application to interior stream buffer issues"). But the County failed to do so; instead, putting this issue off for a later time:

While recognizing the low quality of these critical areas, the County was not prepared during this remand period to revise its critical area designations for these urban areas. Such action will require more detailed locally specific information, which is currently being developed with the inventory of Kitsap County's shoreline and the impending Shoreline Management Program update.

AR V8, Tab 72 at 20 n.86. Unwilling to perform the necessary studies, the County admits that it adopted buffers that are "more than adequate" to protect whatever functions may be found upon completion of a shoreline inventory. AR V8, Tab 72 at 20 (a "50-foot buffer accordingly provides *more than*

adequate protection”) (emphasis added); AR V8, Tab 72 at 20 (degraded functions of its urban shorelines could be protected “by a buffer width of 50 feet *or less*”) (emphasis added). The County failed to include applicable BAS in its record to support its urban marine buffers, and that is sufficient reason to reverse the buffer regulations. *Swinomish*, 161 Wn.2d at 430-31; *Ferry County*, 155 Wn.2d at 835.

C. The County Failed To Include Necessary Analysis of the Conditions on Its Rural/Semi-Rural Marine Shorelines

The County’s designation of its rural/semi-rural marine buffers fails to comply with the GMA’s BAS requirement. Notably, the County fails to explain how it arrived at the conclusion that all 260 miles of rural/semi-rural area shoreline contained identical, fully intact riparian areas. *See* AR V8, Tab 72 at 17. This information is missing because the County did not believe the GMA requires that it conduct area-relevant studies. *See* AR V7, Tab 55 at 149-151 (“GMA does not necessarily require the County to go out and do this scientific study that would involve inventories and other compilations of evidence . . .”).

The County explained below that it had relied on Pierce County’s near-shore assessment (scoring various segments of its shorelines from highest to lowest value in terms of existing functions) to speculate about the

range of functions *that could exist* in different shoreline areas. AR V8, Tab 73 at 40; AR V8, Tab 83 at 27 (“[W]ith the use of the Pierce County near-shore assessment, we evaluated the functions *that can exist* in those critical areas off the different parts of the shoreline.”) (emphasis added). The County concluded that its entire rural/semi-rural designation was similar in description to those areas that Pierce County had scored as having the highest value, while the urban designation (8.5 miles) was similar to those areas having the lowest score.¹⁰ AR V8, Tab 72 at 14-19. Lest there be any doubt, the County confirmed to the Growth Board that the Pierce County study was the essential “link” to its determination that all 260 miles of its rural/semi-rural shoreline *could* have fully intact riparian areas. And that determination led to the adoption of the 100-foot buffer. *See* AR V8, Tab 83 at 27. Without BAS to show the actual conditions of its shorelines, the County’s buffers were based on prohibited “speculation and surmise,” and should be reversed.

¹⁰ Application of the shoreline inventory in Pierce County lead to strikingly different results than did the application in this case. In Pierce County, the use of applicable marine shoreline science resulted in a determination that only 20 miles of its 179-mile shoreline provided “high value” critical salmon habitat. *Tahoma Audubon Soc’y People for Puget Sound v. Pierce County*, CPSGMHB No. 05-3-0004c at 2 (Order Finding Compliance, Jan. 12, 2006).

III

KITSAP COUNTY'S MARINE SHORELINE BUFFER REQUIREMENT VIOLATES RCW 82.02.020

Kitsap County tries to avoid KAPO's RCW 82.02.020 challenge by complaining that this issue was not sufficiently raised below. *See* Kitsap County Resp. Br. at 35-36 ("RCW 82.02.020 . . . was never argued in [KAPO's] briefs to the Board."). The County is incorrect. KAPO's RCW 82.02.020 challenge was pleaded, briefed, and reviewed by the Growth Board.¹¹ This issue is properly before this Court.

A. The County's Marine Shoreline Buffers Impose an In Kind Indirect Tax, Fee, or Charge on New Development

Kitsap County's buffer regulations exact land, services, and an agreement to allocate liability in a preset and uniform manner as a mandatory condition on any new development:¹²

¹¹ *See, e.g.*, AR V3, Tab 37 at 14 (KAPO's Opening Br.); AR V6, Tab 42 at 38 n.80 (Kitsap County Resp. Br.); AR V7, Tab 47 at 27-28 (KAPO's Reply Br.); AR V8 Tab 74 at 3-6 (KAPO's Resp.); AR V7, Tab 60 at 45-46, n.59 (Final Decision and Order); AR V8, Tab 83 at 29 (Kitsap County oral argument). Even if KAPO had not raised this issue before the Growth Board, it may be raised for the first time on appeal. *See Peste v. Mason County*, 133 Wn. App. 456, 469 (2006) (a party may bring claim based on a violation of constitutionally protected right under RCW 34.05.570(3)(a) and/or RAP 2.5(a)).

¹² KCC 19.100.150 (County will condition permit application on compliance
(continued...))

- The property owner is required to file a binding site plan designating an area which must be maintained as “undisturbed natural vegetation areas except where the buffer can be enhanced to improve its functional attributes.” KCC 19.300.315(A)(1), (8).
- The property owner is thereafter prohibited from using the designated buffer area, except “to enhance the buffer by planting indigenous vegetation, as approved by the department.” KCC 19.300.315(A)(2).
- The property owner is required to protect the buffer areas. KCC 19.300.315(A)(8).
- The property owner must file a notice on his or her title, agreeing to limit the lawful use of the property and accepting all responsibility for any risks associated with maintaining the critical area in an undisturbed natural state. KCC 19.100.150; KCC 19.300.315(A)(1).

The County admits that its regulations automatically impose these conditions, but insists they are somehow different from the types of conditions that are subject to the nexus and proportionality limitations of RCW 82.02.020. The County argues, without analysis of relevant case law, that application of RCW 82.02.020 should be limited to conditions that require a formal transfer of title or a transfer of money.¹³ See Kitsap County

¹² (...continued)
with buffer requirements).

¹³ Even if RCW 82.02.020 is limited to dedications, it does not require that a property owner formally execute a transfer of title to the public in order for a set-aside to constitute a dedication of land. *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 758-59 (2002). A dedication to the public under RCW 82.02.020 can be achieved via notice on a binding public document and acceptance. *E.g.*, *Richardson v. Cox*, 108 Wn. App. 881, 884, 890-91 (2001); RCW 58.17.110.

Resp. Br. at 37-38. This argument has been repeatedly rejected by our Courts.¹⁴ Our Supreme Court has held that “for purposes of RCW 82.02.020, a tax, fee, or charge can be in kind as well as in dollars” and can include a “dedication or reservation of open space.” *Isla Verde*, 146 Wn.2d at 758-59; *see also Trimmen Dev. Co. v. King County*, 124 Wn.2d 261, 272 (1994); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 16 (1992); *San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 20, 24 (1987). The County’s exactions of land, services, and allocation of liability imposed by fall within the purview of RCW 82.02.020.

Kitsap County alternatively argues, without citation to authority, that a critical area regulation can never be subject to nexus and rough proportionality. The County is wrong.¹⁵ In *Dolan*, the United States

¹⁴ *See, e.g., Isla Verde*, 146 Wn.2d at 757-58; *Citizens’ Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 664 (2008); *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 138 (2000); *Benchmark Land Co. v. City of Battle Ground*, 103 Wn. App. 721, 723-28 (2000), *affirmed on other grounds*, 146 Wn.2d 685 (2002); *Honesty in Env’tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 534 (1999).

¹⁵ This argument invokes the refuted *pre-Lucas* belief that any action designed to prevent environmental harm will not be answerable to a takings claim. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992); James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. Env’tl. Aff. L. Rev. 1, 13 (2002) (The *Lucas* Court has “refuted the notion that a regulation designed to protect the public interest by preventing harm is automatically immune from takings liability.”).

Supreme Court held that a mandatory buffer to control stormwater runoff would constitute a taking unless the local government was able to demonstrate nexus and rough proportionality. *Dolan v. City of Tigard*, 512 U.S. 374, 380, 389 (1994); *see also Lucas*, 505 U.S. at 1018-19 (conservation easements and similar negative regulation deprive the landowner of a distinct property interest and may result in a taking); *Isla Verde*, 146 Wn.2d at 752-54 (invalidating open space requirement intended to protect the environment and provide critical habitat); *Citizens' Alliance*, 145 Wn. App. at 661-64 (invalidating open space set aside intended to protect against stormwater runoff). Application of the nexus and rough proportionality tests *is not* a judicial check on the validity or reasonableness of the regulation itself, as the doctrine does not call into question government's discretionary decision to regulate or the policies underlying the regulation. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547-48 (2005). Instead, application of these tests corrects an unlawful outcome resulting from government regulation. *See id.* Therefore, the question whether a regulation is subject to the nexus and proportionality does not turn on the purpose of the regulation, but instead on whether the regulation imposes a condition on development intended to mitigate for harm to public facilities. *Dolan*, 512 U.S. at 389-90; *Isla Verde*, 146 Wn.2d at 763-65; *Trimen*, 124 Wn.2d at 269.

B. The County Has Not Demonstrated a Connection Between Its Development Conditions and the Impact of New Development on Its Marine Shorelines

To satisfy the essential nexus requirement, local government must demonstrate “a close causal nexus between the burdens imposed by the regulations and the social costs that would otherwise be imposed by the property’s unregulated use.”¹⁶ It is this causal connection, “not a means-end fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners.”¹⁷

The County failed to address how the existing functions of its marine shorelines would be threatened in the absence of its buffer conditions. Instead, the County relies solely on the Growth Board’s conclusion that its buffers were supported by BAS, erroneously assuming that this decision was determinative of the nexus analysis. *See Kitsap County Resp. Br.* at 39-41. But the Board’s decision was strictly limited to compliance with the

¹⁶ R. S. Radford, *Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 Fordham Envtl. L. Rev. 353, 390 (2004) (citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 838-39 (1984)); *Burton v. Clark County*, 91 Wn. App. 505, 521-22 (1998) (To establish nexus, the County “must show that the development . . . will create or exacerbate the identified public problem” and that its proposed condition “tends to solve, or at least to alleviate, the identified public problem.”).

¹⁷ Radford, 15 Fordham Envtl. L. Rev. at 391.

GMA—not the substantive requirements of RCW 82.02.020 and *Nollan*.¹⁸ *See Citizens' Alliance*, 145 Wn. App. at 668-70 (King County failed to satisfy RCW 82.02.020, despite a Growth Board determination that its critical areas regulation was supported by BAS.). The County has not provided any substantive argument on nexus.

The County has similarly failed to satisfy its burden of demonstrating proportionality, which requires “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Dolan*, 512 U.S. at 391. Instead, Kitsap County relies on the GMA’s statement of intent and excerpts from the BAS referring to general impacts of development on shorelines. *See Kitsap County Resp. Br.* at 41-43. These citations do not address proportionality.

The County’s claim that BAS supported the size of its marine shoreline buffers falls apart upon scrutiny. In addressing proportionality, the County recites a passage from the Brennan and Culverwell study concluding that the removal of vegetation in upland riparian areas generally impacts the

¹⁸ The growth boards are quasi judicial administrative agencies with limited review authority under their enabling statute. RCW 36.70A.250-.280; *Thurston County*, 164 Wn.2d at 358-59. The boards lack authority to decide claims alleging a violation of property rights, including a violation of RCW 82.02. *See, e.g., Open Frame LLC v. City of Tukwila*, CPSGMHB No. 06-3-0028, 2006 WL 3694092, at *7 (Nov. 17, 2006) (“[F]or the Board to review any of the City’s actions . . . would amount to the Board’s review of actions under RCW 82.02, for which [the Board] has no jurisdiction.”).

functions and values of intact shorelines. *See* Kitsap County Resp. Br. at 41-42. But rough proportionality cannot be satisfied by mere reliance on a general impact assessment. *Dolan*, 512 U.S. at 389 (generalized connections are “too lax to adequately protect petitioner’s right to just compensation if her property is taken for a public purpose”). Instead, there must be some sort of individualized determination. *Dolan*, 512 U.S. at 391. Exactions imposed without any effort to quantify the actual impacts of a development project are at serious risk under the rough proportionality test. *Dolan*, 512 U.S. at 389.¹⁹

This is exactly why the Kitsap County’s buffer conditions violate RCW 82.02.020—in adopting its marine buffers, the County failed to make any individualized determination of the actual conditions on its shorelines which is necessary to determine whether the development conditions are proportional to the identified problem. *See, e.g.*, AR V8, Tab 80 at 9 (BAS inapplicable to urban shorelines); AR V8, Tab 83 at 26-27 (same); AR V8, Tab 72 at 20 n.86 (County put off study of urban shorelines); AR V8, Tab 83 at 27 (County relied on a study of Pierce County’s shorelines to assume similar conditions on its shorelines). The County failed to satisfy its burden

¹⁹ *See also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 550 (1995) (“[O]ne clear principle that does emerge from *Dolan* is that most at risk will be those exactions that are imposed because the local government has already decided that it wants the land in question and uses the development approval process as a means to get it.”).

of demonstrating that its buffer conditions are related both in nature and extent to the impact from the use of its shorelines.²⁰ The County's development conditions violate RCW 82.02.020 and should be invalidated.

CONCLUSION

For the foregoing reasons, KAPO respectfully requests that this Court reverse the Board's Final Decision and Order and Compliance Order and conclude that the County's attempt to regulate all shorelines of the state as critical areas is invalid.

DATED: February 1³ 2008.

Respectfully submitted,



BRIAN T. HODGES
(WSBA No. 31976)

Attorney for Petitioners/Appellants

²⁰ Without analysis, Kitsap County claims that the burden of proof under RCW 82.02.020 does not apply where an appeal arises from a GMA challenge. Kitsap County Resp. Br. at 39. The general burden of proof on GMA appeals is no different than the burden generally borne by petitioners challenging an ordinance's validity or seeking review under the Land Use Petition Act. In those circumstances, our courts have never alleviated a local government of its burden of proof under RCW 82.02.020. *See, e.g., Citizens' Alliance*, 145 Wn. App. at 657; *Isla Verde*, 146 Wn.2d at 755-56; *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 346-47 (2007).

DECLARATION OF SERVICE BY MAIL

I, Brian T. Hodges, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004. On February 12, 2009, true copies of APPELLANTS' REPLY TO KITSAP COUNTY were placed in envelopes addressed to:

Lisa J. Nickel
Deputy Prosecuting Attorney for Kitsap County
614 Division Street, MS-34A
Port Orchard, WA 98366-4674

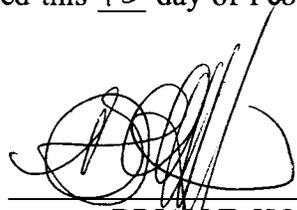
Tim Trohimovich
Futurewise
814 Second Avenue
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Seattle, WA 98104

Martha P. Lantz
Assistant Attorney General
1125 Washington Street
P.O. Box 40110
Olympia, WA 98504-0110

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 13th day of February, 2009, at Bellevue, Washington.



BRIAN T. HODGES

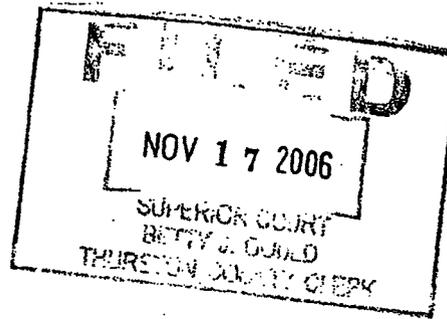
APPENDIX 1

**Thurston County Superior
Court Final Judgment and
Order (11/27/06)**

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STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

FUTUREWISE, EVERGREEN
ISLANDS and SKAGIT AUDUBON
SOCIETY,

Petitioners,

and

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; and CITY OF
ANACORTES,

Respondents

and

WASHINGTON PUBLIC PORTS
ASSOCIATION,

Intervenor.

NO. 06-2-00166-1

FINAL JUDGMENT AND ORDER

EX PARTE

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I. INTRODUCTION

1.1 This matter came before the Court on an appeal filed by Petitioners Futurewise, Evergreen Islands, and Skagit Audubon Society of a Final Decision and Order issued by the Western Washington Growth Management Hearings Board (Board) on December 27, 2005, in *Evergreen Islands, Futurewise and Skagit Audubon Society v. City of Anacortes*, WWGMHB Case No. 05-2-0016.

1.2 The only issue before the Court relates to ESHB 1933 (Laws of 2003, ch. 321), which amended the Growth Management Act ("GMA"), chapter 36.70A RCW, and the Shoreline Management Act ("SMA"), chapter 90.58 RCW. The parties dispute when ESHB 1933 transfers shoreline critical area regulation from the GMA to the SMA.

2. PARTIES

2.1 Petitioners are Futurewise, Evergreen Islands, and Skagit Audubon Society.

2.2 Respondent City of Anacortes appeared to defend the Board's decision.

2.3 The Court granted two motions to intervene, in a stipulated order entered May 14, 2006. The Washington State Department of Community, Trade and Economic Development ("CTED") and the Washington State Department of Ecology ("Ecology") intervened in support of Petitioners; and the Washington Public Ports Association ("WPPA") intervened in support of Respondent.

2.4 Respondent Board is a nominal party to this appeal and did not participate before the Court.

3. PROCEEDINGS

3.1 The Court heard oral argument on October 13, 2006, and reviewed the records and files herein, including:

- Futurewise's, Evergreen Islands', and Skagit Audubon Society's Petitioners' Brief;
- State Agencies' Opening Brief;
- City of Anacortes' Brief;

- 1 • Brief of Respondent Washington Public Ports Association;
2 • Petitioners' Reply Brief; and
3 • State Agencies' Reply Brief.

4 **4. ORDER**

5 Based on the foregoing, it is accordingly ORDERED, ADJUDGED and DECREED as
6 follows:

7 4.1 Shoreline critical area regulation is transferred from the GMA to SMA when a
8 county's or city's Shoreline Master Program update is approved by the Department of
9 Ecology under its 2003 SMA Guidelines consistent with RCW 90.58.090(4) and RCW
10 36.70A.480.

11 4.2 Until the Washington State Department of Ecology has approved an updated
12 Shoreline Master Program consistent with RCW 90.58.090(4) and RCW 36.70A.480, the
13 Growth Management Hearings Board continues to have jurisdiction to review Critical Areas
14 Ordinances, including any provisions that apply to critical areas located within shorelines
15 jurisdiction, for compliance with the procedural and substantive requirements of the GMA.

16 4.3 The Board's conclusion with respect to ESHB 1933, found on page 31, lines 1-
17 8, and conclusion of law H, of its Final Decision and Order is reversed. The City's adoption
18 of regulations in Ordinance 2702 that apply to critical areas in the shoreline does not
19 constitute an amendment to Anacortes' shoreline master program and does not need to be
20 approved by Ecology.

21 4.4 The parties have agreed to the form of this Final Judgment and Order as
22 reflecting the determination of the Court. By agreeing to this Order, no party waives any of
23 its claims or defenses or right to appeal.

24 4.5 The matter is remanded to the Board for further proceedings consistent with
25 this Order.

26

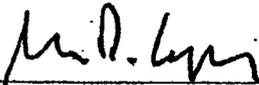
1 DATED this 17th day of November, 2006.

2
3 CHRIS WICKHAM

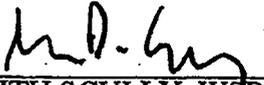
4 THE HONORABLE CHRIS WICKHAM

5 PRESENTED BY:

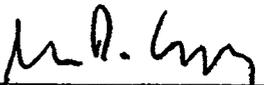
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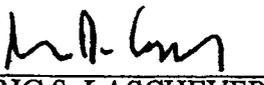
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