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STATE OF WASHINGTON

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BY RONALD R. CARPENTER

SUPREME COURT
OF THE STATE OF WASHINGTON

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; and CITY OF ANACORTES,
Appellants,

WASHINGTON PUBLIC PORTS ASSOCIATION,
Intervenors.

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**BRIEF AMICUS CURIAE OF KITSAP ALLIANCE OF
PROPERTY OWNERS AND PACIFIC LEGAL FOUNDATION**

DIANA M. KIRCHHEIM
WSBA No. 29791
BRIAN T. HODGES
WSBA No. 31976
Pacific Legal Foundation
10940 NE 33rd Place
Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Attorneys for Amici Curiae Kitsap Alliance of
Property Owners and Pacific Legal Foundation

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INTRODUCTION

This case involves the issue of whether critical areas located within shorelines can be regulated under the Growth Management Act (GMA), RCW 36.70A, as opposed to the Shoreline Management Act (SMA), RCW 90.58. Resolution of this issue is important to property owners across this state because the SMA contains explicit substantive rights for property owners. For example, the SMA recognizes the need for shoreline protective structures, even granting a “preference” for issuing such permits. RCW 90.58.100(6). The GMA does not contain any substantive rights for shoreline property owners. Instead, the GMA grants local governments broad discretion in enacting development regulations to protect critical areas based on local circumstances. Allowing the GMA to regulate critical areas located within shorelines jeopardizes the substantive rights guaranteed by the SMA.

In 2003, the Legislature conclusively declared that regulation of shorelines be accomplished solely through the SMA. ESHB 1933, Laws of 2003, ch. 321, *codified at* RCW 36.70A.480. Despite the Legislature’s clear rejection of local government’s authority to regulate shorelines under the GMA, the trial court concluded that critical areas located within shorelines of the state shall continue to be governed by the GMA until local jurisdictions complete their required updates to their local shoreline master programs (SMP). Since some local jurisdictions are not required to complete their SMP updates until 2014, the trial court decision allows the GMA to continue to regulate shoreline areas within some local jurisdictions up to a decade after

the Legislature reaffirmed its intent that the GMA does not govern shoreline areas. See RCW 90.58.080. The trial court decision subverts the Legislature's directive and contradicts case law from this Court. The decision below should be reversed.

IDENTITY AND INTEREST OF AMICI

Pursuant to RAP 10.6, Kitsap Alliance of Property Owners (KAPO) and Pacific Legal Foundation (PLF) respectfully submit this brief amicus curiae supporting Petitioners. KAPO is a private nonprofit association dedicated to the development of effective regulations dealing with the protection of the environment and the use of land in Kitsap County. Currently, KAPO is challenging Kitsap County's update to its critical areas ordinance in part because it designates all marine shorelines as critical areas and provides for no shoreline use exemptions. Kitsap County Case Nos. 06-2-02271-0 and 07-2-01310-7.

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating in the public interest on issues including property rights and environmental law issues. PLF filed an amicus brief in *Biggers v. City of Bainbridge Island*, No. 77150-2 (Wash. Oct. 11, 2007). PLF is also directly representing KAPO in its challenge to Kitsap County's critical areas ordinance.

KAPO and PLF's interest in this case stem from their concern that the substantive rights guaranteed by the SMA to shoreline property owners will

not be recognized if local governments enact conflicting critical area regulations under the GMA.

I

ARGUMENT

REGULATING SHORELINE CRITICAL AREAS UNDER THE GMA CONFLICTS WITH THE SUBSTANTIVE RIGHTS GUARANTEED BY THE SMA

A. The SMA Contains Substantive Rights for Shoreline Property Owners That Are Not Contained in the GMA

This Court recently commented on the substantive rights for property owners specifically enumerated in the SMA in a decision striking down a local government's moratoria on shoreline development. *See Biggers v. City of Bainbridge Island*, No. 77150-2 (Wash. Oct. 11, 2007). Notably, this Court recognized that the "SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development." Slip op. at 20. For example, this Court pointed out that the SMA recognizes the importance of structures that protect shorelines. Slip op. at 20. Specifically, this Court recognized the "SMA contains an express 'preference' for issuing such permits." Slip op. at 21. Further, the Legislature affirmed the efficacy of shoreline protective structures by requiring that all Shoreline Master Programs (SMP) provide for "the issuance of substantial development permits for shoreline protection, including structural methods such as construction of bulkheads." *See* RCW 90.58.100(6).

The Legislature favors the construction of certain shoreline structures by requiring that SMP include exemptions from permitting requirements for them. *See* RCW 90.58.030(3)(e). Examples of activities exempted from the “substantial development” permit requirement include the installation of a protective bulkhead for a single family home, maintenance and repair of existing structures, and construction that is necessary for agricultural activities, such as irrigation structures. *See Biggers*, slip op. at 22 (citing RCW 90.58.030(3)(e)(i)-(iv)).

In contrast to the substantive protections the SMA provides for property owners, the GMA contains no explicit substantive rights. Thus, there is no express “preference” for issuing permits for shoreline structures, nor an explicit mandate from the state, that local ordinances provide for the issuance of permits for shoreline protection, including bulkheads.

At the GMA’s very foundation is the mandate providing local jurisdictions broad deference in planning decisions: the “GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.” *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 125-26 (2005); *See* RCW 36.70A.3201 (“Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances.”); WAC 365-195-010(3) (The GMA “process should be a ‘bottom up’ effort . . . with the central locus of decision-making at the local level.”). Under the GMA, protection of property rights

is merely one of the thirteen goals that a local government must balance with other, often competing, goals when enacting critical area regulations. RCW 36.70A.020; see *Swinomish Indian Tribal Comm. v. Western Washington Growth Management Hearings Board*, __Wn.2d __, 166 P.3d 1198, 1204 (2007). Courts defer to local government implementation of development regulations under the statute so long as local government acts consistently with the requirements of the GMA. See *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 129 (2005); RCW 36.70A.3201.

B. Allowing the GMA to Regulate Critical Areas Within Shoreline Areas Interferes with the Substantive Rights Guaranteed by the SMA

Allowing local governments to regulate shoreline critical areas under the GMA could interfere with the substantive requirements guaranteed by the SMA. For example, a local government could enact critical area regulations requiring buffers along shorelines that would preclude shoreline development that is permitted under the SMA. KAPO has first hand knowledge of such a conflict arising from a local jurisdiction regulating critical areas under the GMA instead of the SMA.

Currently, KAPO is challenging Kitsap County's update to its critical areas ordinance in Kitsap County Superior Court. Kitsap County Case Nos. 06-2-02271-0 and 07-2-01310-7. In part, KAPO is challenging the ordinance's designation of all marine shorelines as critical areas and requirement of marine shoreline buffers from 50 to 100 feet. See *Hood Canal Environmental Council v. Kitsap County*, CPSGMHB No. 06-3-0012c, Order

Finding Compliance, (Apr. 30, 2007), 2007 WL 1452547, at *4-*6; *see also Hood Canal Environmental Council v. Kitsap County*, CPSGMHB No. 06-3-0012c, Final Decision and Order, (Aug. 28, 2006), 2006 WL 2644138 at *15-*24. Notably absent from Kitsap County's critical areas ordinance are any shoreline use exemptions from the buffer requirements. By designating all marine shorelines as critical areas, and providing for no shoreline use exemptions, Kitsap County's critical areas ordinance effectively bars permissible shoreline uses that would be permitted under the SMA. Such rights would include the right to build shoreline protective structures and exemptions from permit requirements for certain types of development. *See* RCW 90.58.100(6) and RCW 90.58.030(3)(e)(i)-(iv).

The wholesale bar of shoreline uses under Kitsap County's ordinance creates an irreconcilable conflict between Kitsap County's critical areas ordinance and its SMP. Thus, regulation of shoreline areas under the GMA poses an imminent threat to Kitsap County property owners' ability to construct and maintain shoreline protective structures, rights guaranteed by the SMA. This leaves shoreline property owners defenseless against the ongoing degradation that unremitting shoreline erosion inflicts.

II

THE SMA IS THE SOLE AUTHORITY FOR REGULATING SHORELINES

A. ESHB 1933 Reaffirmed the Legislature's Intent That the SMA Regulate Shoreline Critical Areas

In *Everett Shorelines Coalition*, the Central Puget Sound Growth Management Hearings Board (Central Board) reviewed an amended SMP and determined that it must comply with both the SMA and GMA. *Everett Shorelines Coalition v. City of Everett*, CPSGMHB No. 02-3-0009c, Final Decision and Order, (Jan. 9, 2003), 2003 WL 394132. Four months after the Central Board issued its decision in *Everett Shorelines Coalition*, the Legislature responded by adopting legislation (ESHB 1933) reversing the Central Board's decision. ESHB 1933, Laws of 2003, ch. 321, *codified at* RCW 36.70A.480.

The parties do not dispute that in enacting ESHB 1933 the Legislature emphatically rejected the Central Board's interpretation of the 1995 amendments to the GMA. Futurewise and the State Intervenors argue that such transfer of authority from the GMA to the SMA cannot occur until a local jurisdiction updates its SMP and it is subsequently approved by the State Department of Ecology. However, this argument cannot be reconciled with ESHB 1933. ESHB 1933 reaffirmed that the authority to regulate shoreline critical areas has always been under the SMA. Prior to the Central Board's decision, no legal authority existed supporting regulation of shorelines under the GMA. The fact that one regional growth board

misinterpreted the Legislature's intent in adopting the 1995 GMA amendments (and was quickly reversed) does not mean that regulatory authority over shoreline critical areas was ever lawfully regulated under the GMA. The Legislature was clear that its purpose in enacting ESHB 1933 was to reverse the Central Board's decision and clarify that the SMA be applied to critical areas located within shorelines as had been the case prior to the Central Board's decision in *Everett Shorelines Coalition*.

[T]his act is to affirm the legislature's intent that the shoreline management act be read, interpreted, applied, and implemented as a whole consistent with decisions of the shoreline hearings board and Washington courts prior to the decision of the central Puget Sound growth management hearings board in *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology*

ESHB 1933, Laws of 2003, ch. 321, § 1.

Even if the Court concludes that ESHB 1933 had the effect of transferring regulatory authority over shoreline critical areas from the GMA to the SMA (rather than acknowledging that the authority always existed under the SMA), there is nothing in the legislation to suggest that ESHB 1933 should be applied only prospectively; the effective date to vary depending on the local jurisdiction. Futurewise's interpretation of ESHB 1933 would permit the GMA to govern shorelines critical areas in some parts of the state until 2014, which is the final deadline for some local jurisdictions to update their SMP. RCW 90.58.080. In this case, the GMA would govern shoreline critical areas within the City of Anacortes until 2012, the statutory deadline for the City of Anacortes to update its SMP. RCW 90.58.080. Thus, *Everett*

Shorelines Coalition would be resurrected contrary to explicit legislative intent.

B. The Trial Court Decision Conflicts with *Biggers*

Recently, this Court issued a decision stating, “the SMA is the exclusive source of shoreline development regulation.” *Biggers*, slip op. at 23. In *Biggers*, the City of Bainbridge enacted rolling moratoria imposing a three year freeze on filing permit applications for shoreline development. Slip op. at 1. In justifying the rolling moratoria, Bainbridge Island argued in part that the GMA granted it authority to enact rolling moratoria. This Court invalidated the moratoria and stated, “The GMA does not displace the SMA as the framework for statewide shoreline regulation.” *Biggers*, slip op. at 24.

[T]he protection of Washington’s shorelines for all citizens is an important state constitutional interest reflected in the SMA enacted by the people. No local government may impose regulations that are in conflict with the state’s general laws. Here, the City’s imposition of repeated moratoria was unconstitutional and unlawful.

Slip op. at 28 (Johnson, J.M., lead opinion).

The trial court decision permitting local governments to regulate shoreline critical areas under the GMA conflicts with *Biggers* because “[u]nder the SMA, the state has the primary authority to manage shoreline development.” Slip op. at 4.

CONCLUSION

This Court should reverse the trial court to confirm that the SMA regulates all shorelines areas. For the foregoing reasons, Amici respectfully request that this Court reverse the trial court decision.

DATED: October 29, 2007.

Respectfully submitted,

DIANA M. KIRCHHEIM
BRIAN T. HODGES

By *Diana Kirchheim*

DIANA M. KIRCHHEIM
WSBA No. 29791
BRIAN T. HODGES
WSBA No. 31976
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Attorneys for Kitsap Alliance of
Property Owners and Pacific
Legal Foundation

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