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DIVISION II

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STATE OF WASHINGTON
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No. 35696-1-II

COURT OF APPEALS
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.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
GLOSSARY	iv
1. INTRODUCTION.....	1
2. ASSIGNMENTS OF ERROR.....	2
2.1 ASSIGNMENTS OF ERROR.....	2
2.2 ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
3. STATEMENT OF THE CASE	2
4. SUMMARY OF ARGUMENT.....	5
5. ARGUMENT	8
5.1 STANDARD OF REVIEW.....	8
5.2 THE SMA GOVERNS SHORELINE CRITICAL AREA AMENDMENTS	10
5.3 ESHB 1933 LIMITS BOARD JURISDICTION OVER SHORELINE CRITICAL AREAS TO SMA COMPLIANCE	12
5.4 JURISDICTIONS “CONTINUE TO REGULATE” UNDER GMA, ONLY WHEN SHORELINE CRITICAL AREA BUFFERS ARE LOCATED OUTSIDE SHORELINE JURISDICTION.....	14
5.5 THE BOARD’S RULING IS FAITHFUL TO THE LEGISLATIVE HISTORY PRECEDING ESHB 1933.	15
5.6 ESHB 1933 (1) PROACTIVELY PROTECTS SHORELINE CRITICAL AREAS; AND (2) FUTUREWISE’S ALLEGED “10-YEAR REGULATORY GAP” IS FICTIONAL.....	17

6. CONCLUSION19
APPENDIX21

TABLE OF AUTHORITIES

Table of Cases

Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology, CPSGMHB #02-3-0009c (2003).....7, 10

Lakewood Ridge Homeowner's Ass'n v. Lakemont Ridge, Ltd., 156 Wn. 2d 696, 131 P.3d 905 (2006).....8

Moore v. Whitman County, 143 Wn.2d 96, 18 P.3d 566 (2001)13

Thurston County v. Cooper Point Assn., 148 Wn.2d 1, 57 P.2d 1156 (2002).....8

Towle v. Washington State Department of Fish and Wildlife, 94 Wn. App. 196, 971 P.2d 591 (1999).....8

Statutes

RCW 34.05.570.....8

Chapter 36.70A RCW.....5

RCW 36.70A.130.....3, 19

RCW 36.70A.172.....11

RCW 36.70A.300.....4

RCW 36.70A.302.....4

RCW 36.70A.480.....5, 11, 13, 14, 18

Chapter 90.58 RCW.....5

RCW 90.58.020.....3

RCW 90.58.080.....19

RCW 90.58.090.....17

RCW 90.58.190.....13

Regulations

WAC 173-26-176.....3

GLOSSARY

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
SEPA	State Environmental Policy Act, Chapter 43.21C RCW

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.

- 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

Seldom does the Legislature step in and reverse the decision of an administrative agency. But, in 2003, the legislature enacted ESHB 1933, and did just that. ESHB 1933 reversed the Central Board's *Everett*² decision just four months after it was issued. The legislation specifically references *Everett*, states the decision was made without sufficient guidance, and then corrects the Central Board's approach to regulating shoreline critical areas through both SMA and GMA:

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 areas outside the jurisdiction of the shoreline management act shall be governed by the growth management act.³

The Board faithfully applied this legislation, finding that amendments to shoreline critical area regulations must be processed through the SMA. The Superior Court ignored this legislative history, finding GMA would continue to regulate such amendments. The Superior Court held that unless and until a jurisdiction amended its **entire** SMP, GMA would continue to govern shoreline critical areas.

The Court of Appeals should reverse the trial court, and re-instate the Board decision.

² *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology*, CPSGMHB #02-3-0009c (January 9, 2003), copy at CP 190-239

³ Appendix 1/AR 557 (ESHB 1933, Sec. 1) (emphasis supplied).

2. ASSIGNMENTS OF ERROR

2.1 Assignments of Error

2.1.1 The Superior Court erred in reversing the Board's Final Decision and Order of December 27, 2005, and remanding to the Board.

2.1.2 The Superior Court erred when it issued a Final Judgment and Order determining that the SMA does not govern any shoreline critical area regulation amendments, unless a jurisdiction amends its **entire** SMP under the 2003 SMA guidelines.

2.2 Issues Pertaining to Assignments of Error

Once jurisdictions have an Ecology approved SMP, ESHB 1933 transfers regulatory authority over shoreline critical areas from the GMA to the SMA. That jurisdictional transfer occurred on the day the legislation became effective. Because of that transfer, do SMA requirements apply when a jurisdiction amends its shoreline critical area regulations?

3. STATEMENT OF THE CASE

The City of Anacortes completed the GMA-required update to its comprehensive plan and development regulations 19 months before the

statutory deadline.⁴ Futurewise appealed four critical area issues to the Board.⁵ All but one have since been resolved. This sole remaining issue relates to City regulation of shoreline critical areas.

The Board decision requires the City to submit shoreline critical areas amendments to Ecology and comply with all SMA requirements. Futurewise appealed the Board decision because it objected to processing the amendments through the SMA.

This litigation will determine whether the City's shorelines, including industrial areas, are governed by GMA or SMA. Many jurisdictions do not protect industrial shorelines through their critical area regulations. The City does not take this approach. The City recognizes, as does the SMA, that its industrial shorelines and other water-dependent uses, must be protected for both economic and environmental purposes. "Anacortes/Fidalgo Island are the source of 70 percent of manufacturing jobs in Skagit County."⁶ Shipyard, fishing and other facilities are dependent on shoreline access.⁷ SMA specifically provides for the protection of these uses, recognizing the critical importance of "industrial and commercial developments which are particularly dependent" on a shoreline location.⁸ 100+ foot buffers for all industrial shorelines, as

⁴ AR 448. The Ordinance was adopted April 18, 2005. The City deadline was not until December 1, 2006. RCW 36.70A.130.

⁵ AR 829-830.

⁶ AR 526.

⁷ AR 539.

⁸ RCW 90.58.020; WAC 173-26-176.

referenced in briefing to the Board,⁹ ignores the law, and would jeopardize these jobs, and the City's economic base.

The City has proactively and aggressively protected its shorelines. The City originally adopted its SMP in 1977, and has since amended it several times with the last update in 2000.¹⁰ The SMP protections are coupled with the City's Fidalgo Bay Restoration Plan, which was jointly developed with Ecology to protect City marine resources; implement pilot eelgrass restoration project; and permanently protect 1,000 acres of tidal lands.¹¹ In addition, through its Community Forest Lands Program, the City permanently protects over 2,600 acres, or close to half the City.¹² The Community Forest Lands protect shoreline resources, by protecting streams originating in the Forest Lands with outlets in Puget Sound. This "mountain to sound" protection for these resources surpasses that of most urban critical areas. In addition, during this litigation, the City has continued to protect shoreline critical areas through its GMA critical area regulations,¹³ which are coupled with protections found in other regulations, including the SMP.

⁹ AR 216-217.

¹⁰ AR 438; AR 551

¹¹ AR 481-482.

¹² For a 15,000 citizen city, this is unprecedented. Compare, for example, Golden Gate Park in San Francisco, (1,017 acres developed for recreational and cultural activities), or Stanley Park in Vancouver B.C. (1,000 acres, also highly developed for recreation). The City of Seattle's total park acreage is 6,052 acres or 11% of the City. AR 450-451. The City of Anacortes' acreage is in addition to several hundred acres of parkland, which are primarily natural forest. AR 450-451.

¹³ Under GMA, existing regulations remain in place during litigation, unless the Board enters an order of invalidity, which did not occur here. RCW 36.70A.300; RCW 36.70A.302.

Yet, even with this history of environmental stewardship, Futurewise prefers to involve the City in litigation designed to delay SMA regulation in a manner inconsistent with ESHB 1933.

4. SUMMARY OF ARGUMENT

The Board correctly determined that when a jurisdiction amends shoreline critical area regulations, it must comply with the SMA,¹⁴ rather than the GMA.¹⁵ The Superior Court reversed, holding that GMA continues to regulate shoreline critical areas until all SMP provisions, including those unrelated to critical areas are “updated.” The City asks the Court to reverse the Superior Court, and uphold the Board’s decision, consistent with the Legislature’s direction in ESHB 1933, that “critical areas within the jurisdiction of the shoreline management act shall be governed by the shoreline management act....”¹⁶ Except in limited circumstances, shoreline critical area regulations “**shall not be subject to the procedural and substantive requirements of**” GMA.¹⁷

Futurewise’s approach is not analytically tenable. With their reasoning, when a jurisdiction amends the SMP segment governing critical areas, GMA applies; but, when a jurisdiction amends multiple segments, or all segments, SMA applies. ESHB 1933 contains no language requiring all segments in an SMP to be amended before the statute is effective.

¹⁴ Codified primarily at Chapter 90.58 RCW.

¹⁵ Codified primarily at Chapter 36.70A RCW.

¹⁶ Appendix 1/AR 557 (ESHB 1933, Sec. 1).

¹⁷ Appendix 1/AR 568 (ESHB 1933, Sec. 5, codified at RCW 36.70A.480(3)(a)).

There is no distinction between amendments which fully address critical areas protections, and amendments which also encompass other SMP provisions. For any SMP amendment, the local government must ensure other provisions in the SMP are consistent with revisions made in the critical areas segment. But, there is no requirement in law to amend the entire SMP.

The Board issued a carefully reasoned decision, which recognized ESHB 1933's plain language and intent. The Board also recognized the resulting review of shoreline regulations by the Department of Ecology provides an added benefit not available under the prior GMA regime:

As we have said, the foremost consideration in construing legislation is to give effect to legislative intent. At the same time, we cannot help but be concerned with the impact of any construction of the statute we make. In this case, though, we find that the impact on protections for critical areas in the shorelines is positive. First, we note that there is nothing in this transfer of authority that in any way lessens protections for critical areas. ESHB 1933 expressly provides that “[s]horeline master programs shall provide a level of protection to critical areas located within shorelines of the state that is at least equal to the level of protection provided to critical areas by the local government’s critical area ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).” Second, the addition of **Ecology’s review and approval process can only benefit all parties, including the boards, in assuring appropriate protections are in place.**¹⁸

The Board’s reasoning is consistent not only with the plain language of ESHB 1933, but also the legislative history preceding its

¹⁸ Appendix 2, AR 853 (Excerpts from Board Decision) (emphasis supplied).

adoption. The Legislature adopted ESHB 1933 to reverse a Central Board decision issued four months earlier.¹⁹ In *Everett*, the Central Board reviewed an amended SMP, and determined that **both** SMA and GMA governed shoreline critical area review. The Legislature rejected the *Everett* approach. The Legislature specifically cited to the *Everett* decision, decided the SMA was to be interpreted consistent with decisions issued **before** *Everett*, and required the growth boards to review shoreline critical areas under the SMA, not GMA.²⁰

Because of this explicit direction, the Board determined the SMA governed shoreline critical area regulation amendments. The Superior Court misread the legislation, going so far as to ignore the Legislature's direction at section 1 of ESHB 1933, that states SMA (not GMA) governs shoreline critical areas.²¹ The Board's carefully reasoned decision recognizing the primacy of the legislative mandate must be affirmed by this Court.

¹⁹ *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology*, CPSGMHB #02-3-0009c (January 9, 2003). ESHB 1933 was signed into law on May 15, 2003, just four months after the Central Board's decision in the *Everett* case. A copy of *Everett* is at CP 190-239.

²⁰ Appendix 1, AR 556-557 (ESHB 1933, Section 1, paragraphs 1 and 3).

²¹ Appendix 1, AR 557 (ESHB 1933, Section 1, paragraph 3); TR 69:3-9.

5. ARGUMENT

5.1 Standard of Review

Petitioners have the burden of proof to demonstrate the Board incorrectly interpreted ESHB 1933, which amended the GMA and SMA.²² The court does not substitute its judgment for that of the Board when reviewing questions of law, but “give[s] substantial weight to the Board interpretation of the statute that it administers.” *Thurston County v. Cooper Point Assn.*, 148 Wn.2d 1, 15, 57 P.3d 1156 (2002) (deferring to Board’s interpretation of term “necessary,” where consistent with legislative intent). When the Board’s interpretation is consistent with legislative intent, its decision is affirmed. *Id.*

The fundamental objective of statutory construction is to ascertain and to carry on the legislature’s intent. **Courts should adopt the interpretation which best advances the legislative intent. The preamble or statement of intent can be crucial to the interpretation of a statute.** Any doubt as to the meaning of a statute should be resolved in favor of the type of claimant for whose benefit it was passed.

Towle v. Washington State Department of Fish and Wildlife, 94 Wn. App. 196, 207, 971 P.2d 591 (1999) (rejecting “plausible” interpretation of statute governing crabbing licenses because it conflicted with legislative intent) (emphasis supplied); *see also Lakewood Ridge Homeowner’s Ass’n v. Lakemont Ridge, Ltd.*, 156 Wn.2d 696, 703, 131 P.3d 905 (2006) (rejecting statutory interpretation regarding pre-filing requirement for

²² RCW 34.05.570. The Court of Appeals considers this matter de novo. It is the Board’s decision, not the trial court’s ruling, that is entitled to substantial weight.

commencing litigation because it conflicted with legislative intent to preserve adequate rights and remedies for property owners).

ESHB 1933 states on its face that critical areas protected through an SMP are governed by SMA and not GMA. To the extent there is any ambiguity in this, the Court **must** be guided by legislative intent. Here, the legislative intent was adopted into law - - a clear expression of legislative intent: “The legislature intends that critical areas within the jurisdiction of the shoreline management act shall be governed by the shoreline management act”²³ To require shoreline critical area regulation amendments to continue to be governed by GMA is contrary to the Legislature’s specific direction. The Board recognized this and ruled accordingly. The Superior Court on review rejected the Board’s construction, and ignored the proper standard of review, which applies to both the superior and appellate courts.²⁴ This Court should reinstate the Board’s reasonable interpretation of ESHB 1933.

The Board administers local government land use planning under both the GMA and SMA. Its decision to immediately transfer regulatory authority over shoreline critical areas from the GMA to the SMA is consistent with ESHB 1933. The Legislature acted to ensure the Growth Boards would, in future, provide local jurisdictions with the flexibility through the SMA to balance competing environmental and economic

²³ Appendix 1/AR 557 (ESHB 1933, Section 1) (emphasis added).

²⁴ CP 422-425.

goals on local shorelines through the SMA. Because the Board's decision is both plausible and consistent with this legislative intent, the Court should accord the Board substantial deference, and uphold its decision.²⁵

5.2 The SMA Governs Shoreline Critical Area Amendments

5.2.1 **The Legislature Acted to Overturn the *Everett* Decision and Place Shoreline Critical Areas within SMA Jurisdiction**

ESHB 1933 was enacted to place shoreline critical area regulation within SMA jurisdiction.²⁶

Critical areas within shorelines of the state that have been identified as meeting the definition of critical areas as defined by RCW 36.70A.030(5), and that are subject to a shoreline master program adopted under applicable shoreline guidelines shall not be subject to the procedural and substantive requirements of this chapter [GMA], except as provided in subsection (6) of this section. [subsection applies when buffers extend outside shoreline jurisdiction]²⁷

The provisions of RCW 36.70A.172 **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 governments shoreline master program with chapter 90.58 RCW and applicable guidelines. Nothing in this section, however, is intended to limit or change the quality**

²⁵ A preliminary ruling during the Court of Appeal's review of Central Board's *Everett* decision, the decision which caused ESHB 1933 to be adopted, held that ESHB 1933 had the immediate effect of removing shoreline management from GMA procedures. CP 150 and 149-153 ("[t]he legislature explicitly indicated that the Best Available Science standards [a GMA requirement] is not to be applied to shoreline management.").

²⁶ CP 190-239, *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology*, CPSGMHB #02-3-0009c, corrected FDO (January 9, 2003).

²⁷ Appendix 1, p. 13/AR 568 (ESHB 1933, section 5, codified at RCW 36.70A.480(3)(b)).

of information to be applied in protecting critical areas within shorelines of the state, as required by chapter 90.58 RCW and applicable guidelines.²⁸

With this language, ESHB 1933 states that GMA's "procedural and substantive requirements" are not applicable to shoreline critical areas. If a jurisdiction amends its shoreline critical area protections, the SMA governs.

5.2.2 When it Adopted ESHB 1933, the Legislature Rejected the Very Position Advanced Here by Futurewise

Futurewise advocates for the exact approach to critical area regulation the Legislature explicitly rejected. The Legislature determined that if a jurisdiction has an Ecology approved SMP, SMA governs SMP amendments:

As of the date the department of ecology approves a local government's shoreline master program adopted under applicable shoreline guidelines, the protection of critical areas as defined by RCW 36.70A.030(5) within shorelines of the state shall be accomplished only through the local government's shoreline master program and shall not be subject to the procedural and substantive requirements of this chapter, except as provided in subsection (6) of this section.²⁹

Futurewise would like to add a sentence to this language providing that the transfer only occurs when "large-scale" amendments, which revise the entire SMP, are adopted consistent with Ecology's 2003 Guidelines. But the Legislature did not state

²⁸ Appendix 1, p. 13/AR 568 (ESHB 1933, section 5, codified at RCW 36.70A.480(3)(c)) (emphasis added).

²⁹ Appendix 1/AR 568 (ESHB 1933, section 5, as codified at RCW 36.70A.480(3)(a)).

this. It rejected language which tied the transfer to the 2003 Guidelines,³⁰ and it absolutely did not add language requiring the entire SMP to be amended before transfer occurred. Rather, transfer occurred on ESHB 1933's effective date, July 27, 2003.³¹

Thus, if: (1) a jurisdiction has an approved SMP (it is undisputed that the City of Anacortes is operating under an approved SMP); and (2) the jurisdiction amends its regulations to protect shoreline critical areas, those amendments **must** be adopted as part of the SMP, and must be consistent with SMA. This is what the Board found and what this Court should affirm.

5.3 ESHB 1933 Limits Board Jurisdiction over Shoreline Critical Areas to SMA Compliance

An Ecology approved SMP can be appealed to the GMA Board. If that occurs, the Board only has jurisdiction to review the shoreline “master program **or amendment**,” for SMA compliance.³² The amendments of prior law from the bill (with strike outs and underlines) in the below paragraph show ESHB 1933 amendments eliminating the Board's GMA jurisdiction over shorelines:

³⁰ AR 590 (Proposed, but rejected legislation for ESHB 1933)

³¹ Appendix 1/AR 555 (ESHB 1933).

³² (Except for GMA's internal consistency provisions and the state's SEPA requirements).

If the appeal to the growth management hearings board concerns shorelines, the growth management hearings board shall review the proposed master program or amendment solely for compliance with the requirements of this chapter and chapter 36.70A RCW, the policy of RCW 90.58.020 and the applicable guidelines, the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58.³³

Another paragraph contained within ESHB 1933 similarly limits

Board jurisdiction:

The policies, goals, and provisions of chapter 90.58 RCW and applicable guidelines shall be the sole basis for determining compliance of a shoreline master program with this chapter except as the shoreline master program is required to comply with the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105.³⁴

The Board therefore cannot review shoreline critical area amendments under GMA. The Board has no authority to apply statutory provisions not listed in its jurisdictional grant. "An agency may only do that which it is authorized to do by the Legislature." *Moore v. Whitman County*, 143 Wn.2d 96, 100, 18 P.3d 566 (2001) (finding Growth Boards lacked jurisdiction over counties not planning under GMA).

Because the Board only has authority to apply the SMA to its review of shoreline critical area amendments, it would be inconsistent with these provisions to force jurisdictions to review shoreline amendments under GMA. By recognizing the limited jurisdiction of the

³³ Appendix 1/AR 566 (ESHB 1933, section 4, codified at RCW 90.58.190(2)(b)).

³⁴ Appendix 1/AR 568 (ESHB 1933, section 5, as codified at RCW 36.70A.480(3)).

Boards, the legislature rejected the broader jurisdiction asserted by Futurewise there and in this case. This Court must similarly reject the efforts of Futurewise to legislate its preferences.

5.4 Jurisdictions “Continue to Regulate” Under GMA, only when Shoreline Critical Area Buffers are Located Outside Shoreline Jurisdiction

Only in a single circumstance are local governments specifically directed to “continue to regulate” shoreline critical areas under GMA. This standard applies when “a local jurisdiction’s master program does not include land necessary for buffers for critical areas that occur within shorelines of the state.”³⁵ GMA only applies if buffering outside the shoreline area (200 feet from the highwater mark) is necessary to protect critical areas.

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).³⁶

It is only in this narrow circumstance where GMA requirements continue to apply to critical areas located within the shoreline.³⁷

³⁵ Appendix 1/AR 569 (ESHB 1933, Section 5, codified at RCW 36.70A.480(6)).

³⁶ Appendix 1/AR 569 (ESHB 1933, section 5, as codified at RCW 36.70A.480(6)).

³⁷ The Board recognized that when Ecology reviewed shoreline critical area amendments, it would consider SMP buffer adequacy, and approve or reject the SMP amendments consistent with that determination. AR 852-853.

5.5 The Board's Ruling is Faithful to the Legislative History Preceding ESHB 1933.

When through statute the legislature reverses a judicial or quasi-judicial precedent, legislative history is well documented. With ESHB 1933, the Legislature explicitly reversed several key holdings of the Central Board's *Everett* decision, including its decision that shoreline critical area amendments must comply with both GMA and SMA. In the *Everett* decision, the **Central Board** had determined:

[GMA] provides that such amendments shall be done subject to the procedures of the Shoreline Management Act, rather than the Growth Management Act. This comports with the **Board's reading that local government shoreline master program amendments have a duty to comply with the goals and substantive requirements of the GMA**, notwithstanding that such amendments will be adopted using the procedures (e.g/, public involvement, Ecology review of fidelity to SMA requirements) of the SMA. ... Shorelines of state-wide significance are GMA critical areas and the SMP amendments are subject to the BAS [best available science] requirements of the GMA.³⁸

The **Legislature** rejected this decision:

The legislature finds that the final decision and order in *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology*, Case No. 02-3-0009c, issued on January 9, 2003, by the central Puget Sound growth management hearings board was a case of first impression interpreting the addition of the shoreline management act into the growth management act, and that the board considered the appeal and issued its final order and decision without the benefit of shorelines guidelines to provide guidance on the implementation of the shoreline management act and the adoption of shoreline master programs.

³⁸ CP 190-239, *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology*, CPSGMHB #02-3-0009c, corrected FDO (January 9, 2003), pgs. 19 and 21 (Board's emphasis and internal citations removed; bolding supplied).

This act is intended to affirm the legislature's intent that:

The shoreline management act be read, interpreted, applied, and implemented as a whole consistent with the 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*.³⁹

The legislature then stated: (1) shorelines of statewide significance are not critical areas just because they are shorelines; (2) GMA does not alter the quality of information the SMA requires for shoreline critical area protection; and (3) shoreline critical areas are governed by the SMA, not GMA.⁴⁰

It took only four months after *Everett* for the Legislature to enact ESHB 1933.⁴¹ This decision to reject the Central Board's earlier attempt to incorporate GMA into SMA shoreline critical area regulation should be faithfully applied. This is exactly what the Board did when the City's regulations were challenged, and its decision should be upheld.

³⁹ Appendix 1/AR 556-557 (ESHB 1933, Sec. 1)

⁴⁰ Appendix 1/AR 556-557 (ESHB 1933, Sec. 1), *see also* remainder of ESHB 1933.

⁴¹ Appendix 1/AR 569 (ESHB 1933). ESHB 1933 was passed by the Legislature April 25, 2003, and signed by the Governor on May 15, 2003. The Central Board decision was issued on January 9, 2003.

5.6 ESHB 1933 (1) Proactively Protects Shoreline Critical Areas; and (2) Futurewise's Alleged "10-Year Regulatory Gap" is Fictional.

5.6.1 **ESHB 1933 Proactively Protects Shoreline Critical Areas by Requiring Increased Oversight**

Before ESHB 1933, jurisdictions could have shoreline critical area enactments that were non-compliant with GMA, as long as no appeals were filed within 60 days of a decision. Consistent with ESHB 1933, the Board's ruling recognizes Ecology must approve any SMP amendment for it to be effective.⁴²

Until amended by local government and approved by Ecology, existing laws stay on the books. ESHB 1933 does not retroactively rescind a single regulation. And, once a jurisdiction amends a segment of a Shoreline Master Program relating to critical areas, Ecology may only approve it if the level of protection provided is equal to that provided by the government's GMA ordinances.

The department [Department of Ecology] 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 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).**⁴³

Shoreline master programs shall provide a level of protection to critical areas located within shorelines of the state that is at least equal to the level of protection provided

⁴² AR 853.

⁴³ Appendix 1/AR 565 (ESHB 1933, section 3, codified at RCW 90.58.090(4)).

to critical areas by the local government's critical area ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).⁴⁴

These provisions of law are effective now, and are applied to any amendment to a SMP section governing critical areas. The law protecting shorelines is not restricted to only "comprehensive amendments," an artificial distinction asserted in this litigation. Under the Board's decision, existing regulations stay in place, but Ecology review of future SMP amendments ensures improved shoreline protections.

5.6.2 Existing Regulations Continue to Protect Shoreline Critical Areas

In previous litigation, Futurewise has asserted an absurd notion that the Board's order may result in a ten-year gap in protection of our state's shorelines.⁴⁵ This is incorrect. Current shoreline protections remain in place. There is no gap in regulatory protection, and there is no legal prohibition on amending shoreline critical area regulations in advance of the legislatively mandated deadlines. The State agencies have admitted this point.⁴⁶

⁴⁴ Appendix 1/AR 568 (ESHB 1933, section 5, as codified at RCW 36.70A.480(4)).

⁴⁵ "Shoreline master programs are to be updated between 2005 and 2014. If ESHB 1933 automatically transferred jurisdiction the Court must accept that the legislature intended to have critical areas in shorelines jurisdiction unprotected for over ten years before SMPs are all updated." CP 92.

⁴⁶ CP 42, heading at paragraph H ("ESHB 1933 allows, but does not mandate, early transfer of critical areas protection in shorelines to shoreline master programs.") (capitalization not shown).

Both GMA and SMA mandate scheduled updates for land use planning documents, including SMP update deadlines.⁴⁷ These deadlines do not prohibit regulatory amendments before the statutory deadlines.⁴⁸ But, if a jurisdiction amends its shoreline critical area regulations before required, the amendments are processed through the SMA.

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 areas outside the jurisdiction of the shoreline management act shall be governed by the growth management act.⁴⁹ ...

The Legislature adopted this language in ESHB 1933. This statement is not simply an indication of intent. It is the law of this state, and this language must be faithfully implemented.⁵⁰ The Board decision does this; the Superior Court decision did not.

6. CONCLUSION

If a local jurisdiction has an Ecology approved SMP (as does the City of Anacortes), the SMA and not GMA applies to shoreline critical area amendments. With ESHB 1933, the Legislature reversed an inconsistent Central Board decision issued four months earlier, and determined the SMA governs shoreline critical area amendments.

⁴⁷ RCW 36.70A.130; RCW 90.58.080.

⁴⁸ Anacortes' GMA amendments are a case in point, as they were adopted 19 months before the statutory deadline.

⁴⁹ Appendix 1/AR 557 (ESHB 1933, Section 1).

⁵⁰ Chapter 321, Laws of 2003, Attachment 1, AR 555 (ESHB 1933).

Futurwise adds language to ESHB 1933 to support its position that transfer from GMA to SMA does not occur until an entire SMP is revised. But the Legislature did not distinguish between critical areas amendments, “large-scale” amendments, or other amendments to an SMP.

In a carefully reasoned decision, the Board assessed this legislative history, reviewed the actual language of ESHB 1933, and determined the SMA applies to shoreline critical area regulation amendments. The City asks the Court to uphold the Board decision.

RESPECTFULLY SUBMITTED this 13th day of April, 2007.

ANACORTES CITY ATTORNEY
Ian S. Munce, WSBA #21527, and

FOSTER PEPPER PLLC

A handwritten signature in black ink, appearing to read 'P. DiJulio', is written over a horizontal line.

P. Stephen DiJulio, WSBA #7139
Susan Elizabeth Drummond, WSBA #30689
Attorneys for Appellant City of Anacortes

APPENDIX

1. Engrossed Substitute House Bill 1933
(AR 555-569)
2. Board Decision Excerpts (December 27, 2005)
(AR 847-854)

APPENDIX 1

ESHB 1933
(AR 000555-000569)

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 1933

Chapter 321, Laws of 2003

58th Legislature
2003 Regular Session

SHORELINE MANAGEMENT

EFFECTIVE DATE: 7/27/03

Passed by the House April 25, 2003
Yeas 98 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 9, 2003
Yeas 45 Nays 0

BRAD OWEN

President of the Senate

Approved May 15, 2003.

GARY F. LOCKE

Governor of the State of Washington

CERTIFICATE

I, Cynthia Zehnder, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is ENGROSSED SUBSTITUTE HOUSE BILL 1933 as passed by the House of Representatives and the Senate on the dates hereon set forth.

CYNTHIA ZEHNDER

Chief Clerk

FILED

May 15, 2003 - 3:53 p.m.

Secretary of State
State of Washington

000555

ENGROSSED SUBSTITUTE HOUSE BILL 1933

AS AMENDED BY THE SENATE

Passed Legislature - 2003 Regular Session

State of Washington

58th Legislature

2003 Regular Session

By House Committee on Local Government (originally sponsored by Representatives Berkey, Kessler, Cairnes, Buck, Sullivan, Orcutt, Hatfield, Jarrett, Miloscia, Gombosky, Grant, DeBolt, Quall, Woods, Schoesler, Conway, Lovick, Clibborn, Edwards, Schindler, McCoy, Eickmeyer and Alexander)

READ FIRST TIME 03/05/03.

1 AN ACT Relating to the integration of shoreline management policies
2 with the growth management act; amending RCW 90.58.030, 90.58.090,
3 90.58.190, and 36.70A.480; and creating a new section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. Sec. 1. (1) The legislature finds that the final
6 decision and order in *Everett Shorelines Coalition v. City of Everett*
7 and *Washington State Department Of Ecology*, Case No. 02-3-0009c, issued
8 on January 9, 2003, by the central Puget Sound growth management
9 hearings board was a case of first impression interpreting the addition
10 of the shoreline management act into the growth management act, and
11 that the board considered the appeal and issued its final order and
12 decision without the benefit of shorelines guidelines to provide
13 guidance on the implementation of the shoreline management act and the
14 adoption of shoreline master programs.

15 (2) This act is intended to affirm the legislature's intent that:

16 (a) The shoreline management act be read, interpreted, applied, and
17 implemented as a whole consistent with decisions of the shoreline
18 hearings board and Washington courts prior to the decision of the

1 central Puget Sound growth management hearings board in Everett
2 *Shorelines Coalition v. City of Everett and Washington State Department*
3 *of Ecology;*

4 (b) The goals of the growth management act, including the goals and
5 policies of the shoreline management act, set forth in RCW 36.70A.020
6 and included in RCW 36.70A.020 by RCW 36.70A.480, continue to be listed
7 without an order of priority; and

8 (c) Shorelines of statewide significance may include critical areas
9 as defined by RCW 36.70A.030(5), but that shorelines of statewide
10 significance are not critical areas simply because they are shorelines
11 of statewide significance.

12 (3) The legislature intends that critical areas within the
13 jurisdiction of the shoreline management act shall be governed by the
14 shoreline management act and that critical areas outside the
15 jurisdiction of the shoreline management act shall be governed by the
16 growth management act. The legislature further intends that the
17 quality of information currently required by the shoreline management
18 act to be applied to the protection of critical areas within shorelines
19 of the state shall not be limited or changed by the provisions of the
20 growth management act.

21 **Sec. 2.** RCW 90.58.030 and 2002 c 230 s 2 are each amended to read
22 as follows:

23 As used in this chapter, unless the context otherwise requires, the
24 following definitions and concepts apply:

- 25 (1) Administration:
 - 26 (a) "Department" means the department of ecology;
 - 27 (b) "Director" means the director of the department of ecology;
 - 28 (c) "Local government" means any county, incorporated city, or town
29 which contains within its boundaries any lands or waters subject to
30 this chapter;
 - 31 (d) "Person" means an individual, partnership, corporation,
32 association, organization, cooperative, public or municipal
33 corporation, or agency of the state or local governmental unit however
34 designated;
 - 35 (e) "Hearing board" means the shoreline hearings board established
36 by this chapter.

37 (2) Geographical:

1 (a) "Extreme low tide" means the lowest line on the land reached by
2 a receding tide;

3 (b) "Ordinary high water mark" on all lakes, streams, and tidal
4 water is that mark that will be found by examining the bed and banks
5 and ascertaining where the presence and action of waters are so common
6 and usual, and so long continued in all ordinary years, as to mark upon
7 the soil a character distinct from that of the abutting upland, in
8 respect to vegetation as that condition exists on June 1, 1971, as it
9 may naturally change thereafter, or as it may change thereafter in
10 accordance with permits issued by a local government or the department:
11 PROVIDED, That in any area where the ordinary high water mark cannot be
12 found, the ordinary high water mark adjoining salt water shall be the
13 line of mean higher high tide and the ordinary high water mark
14 adjoining fresh water shall be the line of mean high water;

15 (c) "Shorelines of the state" are the total of all "shorelines" and
16 "shorelines of statewide significance" within the state;

17 (d) "Shorelines" means all of the water areas of the state,
18 including reservoirs, and their associated shorelands, together with
19 the lands underlying them; except (i) shorelines of statewide
20 significance; (ii) shorelines on segments of streams upstream of a
21 point where the mean annual flow is twenty cubic feet per second or
22 less and the wetlands associated with such upstream segments; and (iii)
23 shorelines on lakes less than twenty acres in size and wetlands
24 associated with such small lakes;

25 (e) "Shorelines of statewide significance" means the following
26 shorelines of the state:

27 (i) The area between the ordinary high water mark and the western
28 boundary of the state from Cape Disappointment on the south to Cape
29 Flattery on the north, including harbors, bays, estuaries, and inlets;

30 (ii) Those areas of Puget Sound and adjacent salt waters and the
31 Strait of Juan de Fuca between the ordinary high water mark and the
32 line of extreme low tide as follows:

33 (A) Nisqually Delta--from DeWolf Bight to Tatsolo Point,

34 (B) Birch Bay--from Point Whitehorn to Birch Point,

35 (C) Hood Canal--from Tala Point to Foulweather Bluff,

36 (D) Skagit Bay and adjacent area--from Brown Point to Yokeko Point,
37 and

38 (E) Padilla Bay--from March Point to William Point;

1 (iii) Those areas of Puget Sound and the Strait of Juan de Fuca and
2 adjacent salt waters north to the Canadian line and lying seaward from
3 the line of extreme low tide;

4 (iv) Those lakes, whether natural, artificial, or a combination
5 thereof, with a surface acreage of one thousand acres or more measured
6 at the ordinary high water mark;

7 (v) Those natural rivers or segments thereof as follows:

8 (A) Any west of the crest of the Cascade range downstream of a
9 point where the mean annual flow is measured at one thousand cubic feet
10 per second or more,

11 (B) Any east of the crest of the Cascade range downstream of a
12 point where the annual flow is measured at two hundred cubic feet per
13 second or more, or those portions of rivers east of the crest of the
14 Cascade range downstream from the first three hundred square miles of
15 drainage area, whichever is longer;

16 (vi) Those shorelands associated with (i), (ii), (iv), and (v) of
17 this subsection (2)(e);

18 (f) "Shorelands" or "shoreland areas" means those lands extending
19 landward for two hundred feet in all directions as measured on a
20 horizontal plane from the ordinary high water mark; floodways and
21 contiguous floodplain areas landward two hundred feet from such
22 floodways; and all wetlands and river deltas associated with the
23 streams, lakes, and tidal waters which are subject to the provisions of
24 this chapter; the same to be designated as to location by the
25 department of ecology.

26 (i) Any county or city may determine that portion of a one-hundred-
27 year-flood plain to be included in its master program as long as such
28 portion includes, as a minimum, the floodway and the adjacent land
29 extending landward two hundred feet therefrom.

30 (ii) Any city or county may also include in its master program land
31 necessary for buffers for critical areas, as defined in chapter 36.70A
32 RCW, that occur within shorelines of the state, provided that forest
33 practices regulated under chapter 76.09 RCW, except conversions to
34 nonforest land use, on lands subject to the provisions of this
35 subsection (2)(f)(ii) are not subject to additional regulations under
36 this chapter;

37 (g) "Floodway" means those portions of the area of a river valley
38 lying streamward from the outer limits of a watercourse upon which

1 flood waters are carried during periods of flooding that occur with
2 reasonable regularity, although not necessarily annually, said floodway
3 being identified, under normal condition, by changes in surface soil
4 conditions or changes in types or quality of vegetative ground cover
5 condition. The floodway shall not include those lands that can
6 reasonably be expected to be protected from flood waters by flood
7 control devices maintained by or maintained under license from the
8 federal government, the state, or a political subdivision of the state;

9 (h) "Wetlands" means areas that are inundated or saturated by
10 surface water or ground water at a frequency and duration sufficient to
11 support, and that under normal circumstances do support, a prevalence
12 of vegetation typically adapted for life in saturated soil conditions.
13 Wetlands generally include swamps, marshes, bogs, and similar areas.
14 Wetlands do not include those artificial wetlands intentionally created
15 from nonwetland sites, including, but not limited to, irrigation and
16 drainage ditches, grass-lined swales, canals, detention facilities,
17 wastewater treatment facilities, farm ponds, and landscape amenities,
18 or those wetlands created after July 1, 1990, that were unintentionally
19 created as a result of the construction of a road, street, or highway.
20 Wetlands may include those artificial wetlands intentionally created
21 from nonwetland areas to mitigate the conversion of wetlands.

22 (3) Procedural terms:

23 (a) "Guidelines" means those standards adopted to implement the
24 policy of this chapter for regulation of use of the shorelines of the
25 state prior to adoption of master programs. Such standards shall also
26 provide criteria to local governments and the department in developing
27 master programs;

28 (b) "Master program" shall mean the comprehensive use plan for a
29 described area, and the use regulations together with maps, diagrams,
30 charts, or other descriptive material and text, a statement of desired
31 goals, and standards developed in accordance with the policies
32 enunciated in RCW 90.58.020;

33 (c) "State master program" is the cumulative total of all master
34 programs approved or adopted by the department of ecology;

35 (d) "Development" means a use consisting of the construction or
36 exterior alteration of structures; dredging; drilling; dumping;
37 filling; removal of any sand, gravel, or minerals; bulkheading; driving
38 of piling; placing of obstructions; or any project of a permanent or

1 temporary nature which interferes with the normal public use of the
2 surface of the waters overlying lands subject to this chapter at any
3 state of water level;

4 (e) "Substantial development" shall mean any development of which
5 the total cost or fair market value exceeds five thousand dollars, or
6 any development which materially interferes with the normal public use
7 of the water or shorelines of the state. The dollar threshold
8 established in this subsection (3)(e) must be adjusted for inflation by
9 the office of financial management every five years, beginning July 1,
10 2007, based upon changes in the consumer price index during that time
11 period. "Consumer price index" means, for any calendar year, that
12 year's annual average consumer price index, Seattle, Washington area,
13 for urban wage earners and clerical workers, all items, compiled by the
14 bureau of labor and statistics, United States department of labor. The
15 office of financial management must calculate the new dollar threshold
16 and transmit it to the office of the code reviser for publication in
17 the Washington State Register at least one month before the new dollar
18 threshold is to take effect. The following shall not be considered
19 substantial developments for the purpose of this chapter:

20 (i) Normal maintenance or repair of existing structures or
21 developments, including damage by accident, fire, or elements;

22 (ii) Construction of the normal protective bulkhead common to
23 single family residences;

24 (iii) Emergency construction necessary to protect property from
25 damage by the elements;

26 (iv) Construction and practices normal or necessary for farming,
27 irrigation, and ranching activities, including agricultural service
28 roads and utilities on shorelands, and the construction and maintenance
29 of irrigation structures including but not limited to head gates,
30 pumping facilities, and irrigation channels. A feedlot of any size,
31 all processing plants, other activities of a commercial nature,
32 alteration of the contour of the shorelands by leveling or filling
33 other than that which results from normal cultivation, shall not be
34 considered normal or necessary farming or ranching activities. A
35 feedlot shall be an enclosure or facility used or capable of being used
36 for feeding livestock hay, grain, silage, or other livestock feed, but
37 shall not include land for growing crops or vegetation for livestock

1 feeding and/or grazing, nor shall it include normal livestock wintering
2 operations;

3 (v) Construction or modification of navigational aids such as
4 channel markers and anchor buoys;

5 (vi) Construction on shorelands by an owner, lessee, or contract
6 purchaser of a single family residence for his own use or for the use
7 of his or her family, which residence does not exceed a height of
8 thirty-five feet above average grade level and which meets all
9 requirements of the state agency or local government having
10 jurisdiction thereof, other than requirements imposed pursuant to this
11 chapter;

12 (vii) Construction of a dock, including a community dock, designed
13 for pleasure craft only, for the private noncommercial use of the
14 owner, lessee, or contract purchaser of single and multiple family
15 residences. This exception applies if either: (A) In salt waters, the
16 fair market value of the dock does not exceed two thousand five hundred
17 dollars; or (B) in fresh waters, the fair market value of the dock does
18 not exceed ten thousand dollars, but if subsequent construction having
19 a fair market value exceeding two thousand five hundred dollars occurs
20 within five years of completion of the prior construction, the
21 subsequent construction shall be considered a substantial development
22 for the purpose of this chapter;

23 (viii) Operation, maintenance, or construction of canals,
24 waterways, drains, reservoirs, or other facilities that now exist or
25 are hereafter created or developed as a part of an irrigation system
26 for the primary purpose of making use of system waters, including
27 return flow and artificially stored ground water for the irrigation of
28 lands;

29 (ix) The marking of property lines or corners on state owned lands,
30 when such marking does not significantly interfere with normal public
31 use of the surface of the water;

32 (x) Operation and maintenance of any system of dikes, ditches,
33 drains, or other facilities existing on September 8, 1975, which were
34 created, developed, or utilized primarily as a part of an agricultural
35 drainage or diking system;

36 (xi) Site exploration and investigation activities that are
37 prerequisite to preparation of an application for development
38 authorization under this chapter, if:

1 (A) The activity does not interfere with the normal public use of
2 the surface waters;

3 (B) The activity will have no significant adverse impact on the
4 environment including, but not limited to, fish, wildlife, fish or
5 wildlife habitat, water quality, and aesthetic values;

6 (C) The activity does not involve the installation of a structure,
7 and upon completion of the activity the vegetation and land
8 configuration of the site are restored to conditions existing before
9 the activity;

10 (D) A private entity seeking development authorization under this
11 section first posts a performance bond or provides other evidence of
12 financial responsibility to the local jurisdiction to ensure that the
13 site is restored to preexisting conditions; and

14 (E) The activity is not subject to the permit requirements of RCW
15 90.58.550;

16 (xii) The process of removing or controlling an aquatic noxious
17 weed, as defined in RCW 17.26.020, through the use of an herbicide or
18 other treatment methods applicable to weed control that are recommended
19 by a final environmental impact statement published by the department
20 of agriculture or the department jointly with other state agencies
1 under chapter 43.21C RCW.

22 **Sec. 3.** RCW 90.58.090 and 1997 c 429 s 50 are each amended to read
23 as follows:

24 (1) A master program, segment of a master program, or an amendment
25 to a master program shall become effective when approved by the
26 department. Within the time period provided in RCW 90.58.080, each
27 local government shall have submitted a master program, either totally
28 or by segments, for all shorelines of the state within its jurisdiction
29 to the department for review and approval.

30 (2) Upon receipt of a proposed master program or amendment, the
31 department shall:

32 (a) Provide notice to and opportunity for written comment by all
33 interested parties of record as a part of the local government review
34 process for the proposal and to all persons, groups, and agencies that
35 have requested in writing notice of proposed master programs or
36 amendments generally or for a specific area, subject matter, or issue.

1 The comment period shall be at least thirty days, unless the department
2 determines that the level of complexity or controversy involved
3 supports a shorter period;

4 (b) In the department's discretion, conduct a public hearing during
5 the thirty-day comment period in the jurisdiction proposing the master
6 program or amendment;

7 (c) Within fifteen days after the close of public comment, request
8 the local government to review the issues identified by the public,
9 interested parties, groups, and agencies and provide a written response
10 as to how the proposal addresses the identified issues;

11 (d) Within thirty days after receipt of the local government
12 response pursuant to (c) of this subsection, make written findings and
13 conclusions regarding the consistency of the proposal with the policy
14 of RCW 90.58.020 and the applicable guidelines, provide a response to
15 the issues identified in (c) of this subsection, and either approve the
16 proposal as submitted, recommend specific changes necessary to make the
17 proposal approvable, or deny approval of the proposal in those
18 instances where no alteration of the proposal appears likely to be
19 consistent with the policy of RCW 90.58.020 and the applicable
20 guidelines. The written findings and conclusions shall be provided to
21 the local government, all interested persons, parties, groups, and
22 agencies of record on the proposal;

23 (e) If the department recommends changes to the proposed master
24 program or amendment, within thirty days after the department mails the
25 written findings and conclusions to the local government, the local
26 government may:

27 (i) Agree to the proposed changes. The receipt by the department
28 of the written notice of agreement constitutes final action by the
29 department approving the amendment; or

30 (ii) Submit an alternative proposal. If, in the opinion of the
31 department, the alternative is consistent with the purpose and intent
32 of the changes originally submitted by the department and with this
33 chapter it shall approve the changes and provide written notice to all
34 recipients of the written findings and conclusions. If the department
35 determines the proposal is not consistent with the purpose and intent
36 of the changes proposed by the department, the department may resubmit
37 the proposal for public and agency review pursuant to this section or
38 reject the proposal.

1 (3) The department shall approve the segment of a master program,
2 relating to shorelines unless it determines that the submitted segments
3 are not consistent with the policy of RCW 90.58.020 and the applicable
4 guidelines.

5 (4) The department shall approve the segment of a master program
6 relating to critical areas as defined by RCW 36.70A.030(5) provided the
7 master program segment is consistent with RCW 90.58.020 and applicable
8 shoreline guidelines, and if the segment provides a level of protection
9 of critical areas at least equal to that provided by the local
10 government's critical areas ordinances adopted and thereafter amended
11 pursuant to RCW 36.70A.060(2).

12 (5) The department shall approve those segments of the master
13 program relating to shorelines of statewide significance only after
14 determining the program provides the optimum implementation of the
15 policy of this chapter to satisfy the statewide interest. If the
16 department does not approve a segment of a local government master
17 program relating to a shoreline of statewide significance, the
18 department may develop and by rule adopt an alternative to the local
19 government's proposal.

20 ~~((+5))~~ (6) In the event a local government has not complied with
21 the requirements of RCW 90.58.070 it may thereafter upon written notice
22 to the department elect to adopt a master program for the shorelines
23 within its jurisdiction, in which event it shall comply with the
24 provisions established by this chapter for the adoption of a master
25 program for such shorelines.

26 Upon approval of such master program by the department it shall
27 supersede such master program as may have been adopted by the
28 department for such shorelines.

29 ~~((+6))~~ (7) A master program or amendment to a master program takes
30 effect when and in such form as approved or adopted by the department.
31 Shoreline master programs that were adopted by the department prior to
32 July 22, 1995, in accordance with the provisions of this section then
33 in effect, shall be deemed approved by the department in accordance
34 with the provisions of this section that became effective on that date.
35 The department shall maintain a record of each master program, the
36 action taken on any proposal for adoption or amendment of the master
37 program, and any appeal of the department's action. The department's
38 approved document of record constitutes the official master program.

1 **Sec. 4.** RCW 90.58.190 and 1995 c 347 s 311 are each amended to
2 read as follows:

3 (1) The appeal of the department's decision to adopt a master
4 program or amendment pursuant to RCW 90.58.070(2) or 90.58.090(~~((+4))~~)
5 (5) is governed by RCW 34.05.510 through 34.05.598.

6 (2)(a) The department's decision to approve, reject, or modify a
7 proposed master program or amendment adopted by a local government
8 planning under RCW 36.70A.040 shall be appealed to the growth
9 management hearings board with jurisdiction over the local government.
10 The appeal shall be initiated by filing a petition as provided in RCW
11 36.70A.250 through 36.70A.320.

12 (b) If the appeal to the growth management hearings board concerns
13 shorelines, the growth management hearings board shall review the
14 proposed master program or amendment solely for compliance with the
15 requirements of this chapter (~~(and chapter 36.70A RCW)~~), the policy of
16 RCW 90.58.020 and the applicable guidelines, the internal consistency
17 provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105,
18 and chapter 43.21C RCW as it relates to the adoption of master programs
19 and amendments under chapter 90.58 RCW.

20 (c) If the appeal to the growth management hearings board concerns
21 a shoreline of statewide significance, the board shall uphold the
22 decision by the department unless the board, by clear and convincing
23 evidence, determines that the decision of the department is
24 inconsistent with the policy of RCW 90.58.020 and the applicable
25 guidelines.

26 (d) The appellant has the burden of proof in all appeals to the
27 growth management hearings board under this subsection.

28 (e) Any party aggrieved by a final decision of a growth management
29 hearings board under this subsection may appeal the decision to
30 superior court as provided in RCW 36.70A.300.

31 (3)(a) The department's decision to approve, reject, or modify a
32 proposed master program or master program amendment by a local
33 government not planning under RCW 36.70A.040 shall be appealed to the
34 shorelines hearings board by filing a petition within thirty days of
35 the date of the department's written notice to the local government of
36 the department's decision to approve, reject, or modify a proposed
37 master program or master program amendment as provided in RCW
38 90.58.090(2).

1 (b) In an appeal relating to shorelines, the shorelines hearings
2 board shall review the proposed master program or master program
3 amendment and, after full consideration of the presentations of the
4 local government and the department, shall determine the validity of
5 the local government's master program or amendment in light of the
6 policy of RCW 90.58.020 and the applicable guidelines.

7 (c) In an appeal relating to shorelines of statewide significance,
8 the shorelines hearings board shall uphold the decision by the
9 department unless the board determines, by clear and convincing
10 evidence that the decision of the department is inconsistent with the
11 policy of RCW 90.58.020 and the applicable guidelines.

12 (d) Review by the shorelines hearings board shall be considered an
13 adjudicative proceeding under chapter 34.05 RCW, the Administrative
14 Procedure Act. The aggrieved local government shall have the burden of
15 proof in all such reviews.

16 (e) Whenever possible, the review by the shorelines hearings board
17 shall be heard within the county where the land subject to the proposed
18 master program or master program amendment is primarily located. The
19 department and any local government aggrieved by a final decision of
20 the hearings board may appeal the decision to superior court as
21 provided in chapter 34.05 RCW.

22 (4) A master program amendment shall become effective after the
23 approval of the department or after the decision of the shorelines
24 hearings board to uphold the master program or master program
25 amendment, provided that the board may remand the master program or
26 master program adjustment to the local government or the department for
27 modification prior to the final adoption of the master program or
28 master program amendment.

29 **Sec. 5.** RCW 36.70A.480 and 1995 c 347 s 104 are each amended to
30 read as follows:

31 (1) For shorelines of the state, the goals and policies of the
32 shoreline management act as set forth in RCW 90.58.020 are added as one
33 of the goals of this chapter as set forth in RCW 36.70A.020 without
34 creating an order of priority among the fourteen goals. The goals and
35 policies of a shoreline master program for a county or city approved
36 under chapter 90.58 RCW shall be considered an element of the county or
37 city's comprehensive plan. All other portions of the shoreline master

1 program for a county or city adopted under chapter 90.58 RCW, including
2 use regulations, shall be considered a part of the county or city's
3 development regulations.

4 (2) The shoreline master program shall be adopted pursuant to the
5 procedures of chapter 90.58 RCW rather than the goals, policies, and
6 procedures set forth in this chapter for the adoption of a
7 comprehensive plan or development regulations.

8 (3) The policies, goals, and provisions of chapter 90.58 RCW and
9 applicable guidelines shall be the sole basis for determining
10 compliance of a shoreline master program with this chapter except as
11 the shoreline master program is required to comply with the internal
12 consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and
13 35A.63.105.

14 (a) As of the date the department of ecology approves a local
15 government's shoreline master program adopted under applicable
16 shoreline guidelines, the protection of critical areas as defined by
17 RCW 36.70A.030(5) within shorelines of the state shall be accomplished
18 only through the local government's shoreline master program and shall
19 not be subject to the procedural and substantive requirements of this
20 chapter, except as provided in subsection (6) of this section.

21 (b) Critical areas within shorelines of the state that have been
22 identified as meeting the definition of critical areas as defined by
23 RCW 36.70A.030(5), and that are subject to a shoreline master program
24 adopted under applicable shoreline guidelines shall not be subject to
25 the procedural and substantive requirements of this chapter, except as
26 provided in subsection (6) of this section. Nothing in this act is
27 intended to affect whether or to what extent agricultural activities,
28 as defined in RCW 90.58.065, are subject to chapter 36.70A RCW.

29 (c) The provisions of RCW 36.70A.172 shall not apply to the
30 adoption or subsequent amendment of a local government's shoreline
31 master program and shall not be used to determine compliance of a local
32 government's shoreline master program with chapter 90.58 RCW and
33 applicable guidelines. Nothing in this section, however, is intended
34 to limit or change the quality of information to be applied in
35 protecting critical areas within shorelines of the state, as required
36 by chapter 90.58 RCW and applicable guidelines.

37 (4) Shoreline master programs shall provide a level of protection
38 to critical areas located within shorelines of the state that is at

1 least equal to the level of protection provided to critical areas by
2 the local government's critical area ordinances adopted and thereafter
3 amended pursuant to RCW 36.70A.060(2).

4 (5) Shorelines of the state shall not be considered critical areas
5 under this chapter except to the extent that specific areas located
6 within shorelines of the state qualify for critical area designation
7 based on the definition of critical areas provided by RCW 36.70A.030(5)
8 and have been designated as such by a local government pursuant to RCW
9 36.70A.060(2).

10 (6) If a local jurisdiction's master program does not include land
11 necessary for buffers for critical areas that occur within shorelines
12 of the state, as authorized by RCW 90.58.030(2)(f), then the local
13 jurisdiction shall continue to regulate those critical areas and their
14 required buffers pursuant to RCW 36.70A.060(2).

Passed by the House April 25, 2003.

Passed by the Senate April 9, 2003.

Approved by the Governor May 15, 2003.

Filed in Office of Secretary of State May 15, 2003.

APPENDIX 2

**Excerpts from Board's Final Decision and
Order (December 27, 2005)
(AR 000847-000854)**

1 agencies argue that Ecology did not review the critical areas protections in shorelines
2 before the adoption of ESHB 1933 - "the vast majority of counties and cities left the
3 protection of critical areas along shorelines to their critical areas regulations adopted under
4 the GMA" - and therefore existing shoreline master programs do not address protections for
5 critical areas. *Id.* at 11-12. For this reason, the state agencies argue that critical areas
6 within the shorelines of the state are not governed by shoreline master programs until
7 Ecology approves the critical areas protections in those SMPs.
8

9
10 The Washington Public Ports Association (WPPA) also filed an Amicus Brief on this issue.
11 WPPA expresses concern that the Board's decision in this case "maintain the integrity of the
12 overall framework [of the relationship between the applicability of the GMA and the SMA]
13 that has resulted from such intense and often rancorous debate." Amicus Curiae Brief of
14 the WPPA at 2. WPPA proposes that the Board find that the amendment to ACC 17.41.100
15 applies exclusively within shorelines jurisdiction and addresses a topic that is inherently
16 shorelines limited. *Id.* at 14. On its face, WPPA argues, the regulation is a shoreline
17 regulation. Therefore, WPPA urges the Board should find that the amendment effectively
18 seeks to amend the City's shoreline master program which should be remanded for
19 conformance with the requirements for such an amendment under Ch. 90.58 RCW. *Id.* at
20 15.
21
22

23 24 **Board Discussion**

25 As to the City's first argument, we find that the City did designate critical areas in the
26 shorelines. The designation of "Areas With Which State or Federally Designated
27 Endangered, Threatened, and Sensitive Species Have a Primary Association" and the
28 designation of herring and smelt spawning areas as fish and wildlife habitat areas in
29 Ordinance 2702 makes those areas in the shorelines "critical areas." RCW 36.70A.060.
30

31 ///

32 ///

1 The other two arguments concerning the Board's jurisdiction to decide the issues relating to
2 the marine shorelines critical areas regulation arise out of the interpretation of ESHB 1933.
3 The Board must therefore consider the meaning of ESHB 1933 in this regard in order to
4 decide this issue.
5

6
7 All parties and amicus curiae agree that ESHB 1933 transfers authority for governing critical
8 areas in the shorelines of the state from the Growth Management Act to the Shoreline
9 Management Act. The dispute is over timing. The City argues that this change in authority
10 made its shoreline master program (updated in 2000) the sole source of its critical areas
11 regulations in the shorelines. City of Anacortes' Opposition Brief at 20. Petitioners argue
12 that if such a change happened automatically upon the effective date of ESHB 1933, there
13 would be a ten year gap between the date when shoreline master programs were the sole
14 means of regulating critical areas and when Ecology reviewed those plans for sufficiency of
15 critical areas regulations. Petitioners' Prehearing Brief at 22. The state agencies are
16 similarly concerned that such an "automatic" and retroactive transfer of authority would
17 result in an unintended gap in critical areas protections. Amicus Brief of State Agencies at
18 12-13.
19
20

21
22 The first principle in construing legislation is to give effect to legislative intent. *Sheehan v.*
23 *Transit Authority*, 155 Wn.2d 740, 747, 2005 Wash. LEXIS 917 (2005). Here, the
24 Legislature has made its intention in adopting ESHB 1933 very clear. In the first section of
25 ESHB 1933, the Legislature expressly stated its intention that critical areas within the
26 shorelines of the state be governed by the Shoreline Management Act, while all other critical
27 areas are governed by the Growth Management Act:

28
29 The legislature intends that critical areas within the jurisdiction of the shoreline
30 management act shall be governed by the shoreline management act and that critical
31 areas outside the jurisdiction of the shoreline management act shall be governed by
32 the growth management act.

Section 1, Paragraph 3, ESHB 1933.

1 Both the City and the Petitioners point to the amendment in RCW 36.70A.480 to support
2 their positions regarding the time at which shoreline master programs will govern critical
3 areas regulations in the shorelines. ESHB 1933 amends RCW 36.70A.480 in a variety of
4 ways, including a provision regarding the date upon which the shoreline master programs of
5 local jurisdictions become the sole source of critical areas regulations in the shorelines:
6

7 As of the date the department of ecology approves a local government's shoreline
8 master program adopted under applicable shoreline guidelines, the protection of
9 critical areas as defined by RCW 36.70A.030(5) within shorelines of the state shall be
10 accomplished only through the local government's shoreline master program and
11 shall not be subject to the procedural and substantive requirements of this chapter,
12 except as provided in subsection (6) of this section.

13 RCW 36.70A.480(3)(a).

14 The purport of this provision relative to when master programs shall govern the protection of
15 critical areas is ambiguous at best. The City claims it means that the City's existing
16 shoreline master program governs critical areas in the shorelines and because it was last
17 amended in 2000, it cannot be challenged here. Petitioners and the state agencies argue
18 that this amendment means that critical areas in the shorelines will not be governed by the
19 SMA until new master programs are enacted and approved according to the schedule
20 adopted in RCW 90.58.080.
21

22
23 Because this provision is ambiguous, the Board must construe it to give effect to legislative
24 intent. As cited above, the express legislative intent in enacting ESHB 1933 is to provide
25 that critical areas within the jurisdiction of the Shoreline Management Act be governed by
26 the Shoreline Management Act, while all other critical areas are governed by the Growth
27 Management Act. Section 1, Paragraph 3, ESHB 1933.
28

29
30 CTED reads RCW 36.70A.480(3)(a) to mean that until such time as Ecology approves a
31 new shoreline master program, protection of critical areas within the shorelines is governed
32 by the GMA requirements for critical areas generally, including best available science

1 (BAS). CTED has issued guidance on this issue, advising that:

2 During the period of time between the effective date of ESHB 1933 and a local
3 government's update of its SMP, the local government's GMA critical areas
4 regulations continue to apply to designated critical areas throughout the jurisdiction.
5 If the local government updates its critical areas ordinance under the GMA before it
6 updates its Shoreline Mast Program then the GMA's BAS requirements will apply to
7 the critical area update in the shoreline jurisdiction until the SMP is updated.

8 Appendix B to Amicus Brief of State Agencies.

9 While we agree that critical areas within the shorelines of the state are not stripped by
10 ESHB 1933 of protections given to them by existing critical areas regulations, we do not
11 agree that ESHB 1933 allows amendments to those regulations to continue to be governed
12 by the GMA. We find it impossible to square such a result with the plain legislative intent
13 expressed in ESHB 1933. As Petitioners point out, because of the statutory deadlines for
14 adopting new shoreline master programs, such a gap would result in a delay of 10 years.
15 Petitioners' Prehearing Brief at 22. By continuing to apply the GMA to critical areas
16 regulations enacted between the time of the adoption of ESHB 1933 and the time Ecology
17 approves new shoreline master programs under the schedule adopted in RCW 90.58.080,
18 this Board would be declining to conform its review of newly adopted critical areas
19 regulations with the express legislative intent for that review until 2011 (at the earliest).
20 Because the Legislature could not have been plainer in indicating that it wants the boards to
21 apply the SMA rather than the GMA and BAS in reviewing challenges to critical areas
22 regulations in the shorelines, we cannot adopt this construction of ESHB 1933.
23
24
25

26 The City argues that this means that its shoreline master program, adopted in 2000,
27 governs critical areas regulations in the shorelines. To accept the City's position, the Board
28 would have to determine that ESHB 1933 was meant to apply retroactively to master
29 programs adopted prior to its enactment. A legislative amendment is presumed to apply
30 prospectively unless there is clear legislative intention to apply it retroactively. "A legislative
31 enactment is presumed to apply prospectively only and will not be held to apply
32

1 retrospectively unless such legislative intent is clearly expressed." *Puyallup v. Pac.*
2 *Northwest Bell Tel. Co.*, 98 Wn.2d 443, 450, 656 P.2d 1035, 1982 Wash. LEXIS 1727
3 (1982). See also *Margula v. Benton Franklin Title*, 131 Wn.2d 171, 930 P.2d 307, 1997
4 Wash. LEXIS 85 (1997); *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 39 P.2d
5 934, (2002) Wash. LEXIS 109 (2001) (setting out conditions for retroactive application).
6 Such a clear expression of retroactive application is not apparent in ESHB 1933.
7

8
9 In fact, retroactive application would contradict another expression of legislative intent found
10 in RCW 36.70A.480(4):

11 Shoreline master programs shall provide a level of protection to critical areas located
12 within shorelines of the state that is at least equal to the level of protection provided
13 to critical areas by the local government's critical area ordinances adopted and
14 thereafter amended pursuant to RCW 36.70A.060(2).
15 RCW 36.70A.480(4).

16
17 Before they can be assured of providing a level of protection "at least equal to the level of
18 protection provided to critical areas by the local government's critical areas ordinance,"
19 shoreline master programs must be reviewed by Ecology for that purpose. According to the
20 Amicus Brief of the State Agencies, Ecology did not review those critical areas protections
21 before ESHB 1933 was adopted. This is evidently the case for the Anacortes Shoreline
22 Master Program. Under the terms of Anacortes' master program, critical areas regulations
23 adopted for the City's critical areas generally govern critical areas in the shorelines:
24

25 The policies and regulations of this Master Program shall apply to all shorelines
26 within the corporate limits of the City of Anacortes. Development within the
27 shorelines must also comply with the City Comprehensive Plan, the Fidalgo Bay Sub-
28 Area Plan, and the City Development Regulations (including critical areas
29 ordinances).
30 City of Anacortes Shoreline Management Master Program, Section 3: Scope.

31 When the City repealed its existing critical areas regulations and enacted its new CAO
32 through Ordinance 2702, it changed the regulations governing critical areas in its

1 shorelines. This change is an amendment to its master program and must be reviewed by
2 Ecology.

3
4 We note that the Legislature anticipated that critical areas regulations in the shorelines may
5 be adopted and reviewed prior to adoption of the entire shoreline master program under
6 revised shoreline guidelines. ESHB 1933 amends the SMA to provide that Ecology may
7 approve the segment of a master program relating to critical areas:
8

9 The department shall approve the segment of a master program relating to critical
10 areas as defined by RCW 36.70A.030(5) provided the master program segment is
11 consistent with RCW 90.58.020 and applicable shoreline guidelines, and if the
12 segment provides a level of protection of critical areas at least equal to that provided
13 by the local government's critical areas ordinances adopted and thereafter amended
14 pursuant to RCW 36.70A.060(2).
15 RCW 90.58.090(4).

16 By applying the procedural and substantive terms of the SMA to critical areas regulations
17 adopted and/or updated after the effective date of ESHB 1933, the SMA applies
18 prospectively to ensure appropriate review by Ecology but does not delay application of the
19 SMA to those critical areas when they are amended. Accordingly, we find that Anacortes'
20 repeal of prior critical areas regulations applicable in its shoreline and its adoption of a new
21 CAO in Ordinance 2702 must meet the requirements for a segment of a master program
22 relating to critical areas in the shorelines. RCW 90.58.090(4). Further, the segment of the
23 Anacortes' master program that relates to shoreline critical areas must be submitted to
24 Ecology for review and approval before appeal to the Board may be had.
25
26

27 In this case, Ordinance 2702 also makes a finding that its shoreline master program
28 includes land necessary for buffers for critical areas that occur within the shorelines of the
29 state. This tracks RCW 36.70A.480(6) (adopted in ESHB 1933), which provides:
30

31 If a local jurisdiction's master program does not include land necessary for buffers for
32 critical areas that occur within shorelines of the state, as authorized by RCW

1 90.58.030(2)(f), then the local jurisdiction shall continue to regulate those critical
2 areas and their required buffers pursuant to RCW 36.70A.060(2).

3
4 Such a determination should also be reviewed by Ecology.

5
6 In sum, we find that, in Ordinance 2702, Anacortes repealed the critical areas regulations
7 applicable in the shorelines under its master program and that its new CAO (to the extent it
8 applies in the shorelines) constitutes the segment of its master program which governs
9 protection of critical areas in the shorelines. Review of the critical areas segment of
10 Anacortes' master program is governed by the SMA and those new regulations become
11 effective only after they have been presented to and approved by Ecology under the
12 direction provided in ESHB 1933, that is, as containing regulations that protect the functions
13 and values of critical areas in the shorelines.
14

15
16 As we have said, the foremost consideration in construing legislation is to give effect to
17 legislative intent. At the same time, we cannot help but be concerned with the impact of any
18 construction of the statute we make. In this case, though, we find that the impact on
19 protections for critical areas in the shorelines is positive. First, we note that there is nothing
20 in this transfer of authority that in any way lessens protections for critical areas. ESHB 1933
21 expressly provides that "[S]horeline master programs shall provide a level of protection to
22 critical areas located within shorelines of the state that is at least equal to the level of
23 protection provided to critical areas by the local government's critical area ordinances
24 adopted and thereafter amended pursuant to RCW 36.70A.060(2)." Second, the addition of
25 Ecology's review and approval process can only benefit all parties, including the boards, in
26 assuring appropriate protections are in place. The expertise that Ecology offers in reviewing
27 master programs and amendments, together with the inclusive process that it brings to
28 bear, will be of major assistance to the boards in applying sound scientific principles to the
29 review of critical areas protections.
30
31
32

1 **Conclusion:** Those critical areas regulations governing critical areas in the shorelines of
2 Anacortes adopted by Ordinance 2702 must be reviewed by Ecology to ensure that they
3 provide "a level of protection to critical areas located within shorelines of the state that is at
4 least equal to the level of protection provided to critical areas by the local government's
5 critical area ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2)."
6 RCW 90.58.090(4). Until those regulations have been reviewed by Ecology, the changes to
7 critical areas regulations in the shorelines are not compliant and not ripe for Board review.
8

9
10 **Forest Buffers (Issue 2)**

11
12 Positions of the Parties

13 With regard to the buffer requirements applicable to forest habitat (as distinct from buffers
14 on wetlands, streams and shorelines), Petitioners argue that RCW 36.70A.050 and WAC
15 365-190-080(b)(5) require that cities and counties designating critical areas must create
16 buffer zones to separate incompatible uses from habitat areas. Petitioners state that
17 although that ACC X.60.30(G)⁶ recommends that the City establish buffers on a case-by-
18 case basis as shown in CTED's "example code,"⁷ it differs from CTED's recommendations
19 because it does not require buffer widths to be consistent with recommendations of WDFW.
20 Petitioners contend that the Ordinance lacks standards to determine appropriate buffer
21 widths. Petitioners' Prehearing Brief at 25.
22
23
24
25
26

27 ⁶ Both the Amended Prehearing Order (July 27, 2005) and the Prehearing Order (August 1, 2005) list this
28 provision as ACC X.60.020(G). No such provision exists in Ordinance 2702. The Petitioners' Prehearing Brief
29 states the provision as ACC X. 60.030(G), the provision related to buffers for habitat areas. The City did not
30 object to the change in code number in the issue statement, and responded to Petitioners' arguments
31 regarding this code provision, so the Board will address this issue.

32 ⁷ Critical Areas Assistance Handbook, Protecting Critical Areas within the Framework of the Growth
Management Act (November 2003)

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THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY an
DEPUTY

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.

No. 35696-1-II

DECLARATION OF SERVICE

DECLARATION OF SERVICE

Alexandria C. Gust 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

On April 13, 2007, I caused one copy of City of Anacortes' 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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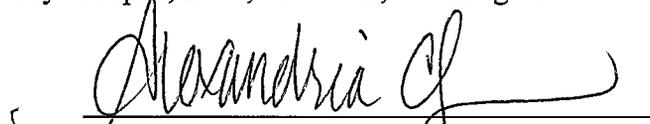
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DECLARATION OF SERVICE - 2

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

DATED this 13th day of April, 2007, at Seattle, Washington.



Alexandria C. Gust, Legal Assistant to
Susan Drummond

DECLARATION OF SERVICE - 3